United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7165
75-7166

To be argued by
DAVID KLINGSBERG

United States Court of Appeals
For the Second Circuit

B

Docket No. 75-7166

INTERNATIONAL RAILWAYS OF
CENTRAL AMERICA,
Plaintiff-Appellant,

PS

against

UNITED BRANDS COMPANY,
Defendant-Appellee.

Docket No. 75-7165

INTERNATIONAL RAILWAYS OF
CENTRAL AMERICA,
Plaintiff-Appellant,

against

COMPANIA AGRICOLA DE GUATEMALA,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF DEFENDANTS-APPELLEES

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Issues Presented for Review

1. Whether the district court's findings of fact that United Brands Company ("United") did not violate the antitrust laws or cause injury to International Railways of Central America ("IRCA") were clearly erroneous, where the findings were based on credible testimony on intent and motive, the opinion evidence of expert witnesses and contemporaneous documents?

2. Whether the district court's findings that United lacked monopolistic intent in closing and disposing of its Tiquisate division in Guatemala were clearly erroneous,

where the testimony and documents established (a) the severe financial and agronomic problems of using that division to grow a new strain of banana to which United was converting, and (b) United's good faith efforts to sell the division to other banana producers?

3. Whether the district court's findings that United did not contract, combine or conspire in restraint of trade were clearly erroneous, where the evidence established that United did not require IRCA by contracts or by the exercise of control to discriminate against United's competitors?

4. Whether the district court's findings that IRCA was not injured as a proximate result of United's conduct were clearly erroneous, where plaintiff failed to prove, among other things, that there were other banana producers with the intent, preparedness and capacity to grow bananas in Guatemala and ship via IRCA's railway, who would have done so but for United's conduct?

5. Whether the district court's findings of fact (paragraphs 3 and 4 above) that United did not use its stock ownership in IRCA to exercise control over it, United did not require IRCA to discriminate against competitors and IRCA was not injured by United's stock ownership during the limitations period, support the dismissal of the claim under Section 7 of the Clayton Act?

6. Whether IRCA can recover where it failed to prove other essential legal elements of its antitrust claims, including, among others, standing to sue for violations allegedly aimed at United's competitors?

7. Whether the district court applied proper procedural principles to the admission and exclusion of evidence, and whether the few exclusions could have filled the many gaps in plaintiff's proof?

8. Whether the district court's findings that CAG did not breach its contract with IRCA were clearly erroneous where the relevant contract expired on January 1, 1963 and CAG ceased shipping via IRCA in 1964 when the Tiquisate division was closed?

Statement of the Case

This is an action against United Brands Company ("United"), formerly United Fruit Company ("UF" or "United"), and Compania Agricola de Guatemala ("CAG"), charging United with violations of the antitrust laws and breach of contract, and charging CAG with breach of contract. This appeal is taken from a decision and Findings of Fact and Conclusions of Law of Hon. Murray I. Gurfein, dated January 29, 1975 (I-193-251A; I-252-369A), rendered after trial on the issue of liability, dismissing plaintiff's complaints in all respects. Plaintiff also appeals from that portion of Judge Gurfein's decision below granting defendants' motion for partial summary judgment on plaintiff's contract claim. (I-43-48A).

A. The Parties

Plaintiff, International Railways of Central America ("IRCA"), was engaged in the operation of a railroad whose main line ran from Puerto Barrios on the Atlantic coast of Guatemala across the isthmus to the Pacific coast. (FF 1, I-253A).*

Defendant United was engaged in production and purchase of tropical products, especially bananas, in Central and South America and the Caribbean, for sale in the United States and other countries. (FF 4, I-254A). Defendant CAG, United's wholly-owned subsidiary, was until August, 1964 engaged in banana production on the Pacific side of Guatemala, and its bananas were shipped, pursuant to contract, about 300 miles via IRCA's lines to Puerto Barrios. CAG sold its bananas to another United subsidiary which in turn marketed them. (FF 5, I-254A).

* Findings of Fact ("FF") and Conclusions of Law ("CL") are cited to the volume and page of the Joint Appendix. Trial exhibits and transcript are also cited to the Joint Appendix, or by exhibit or page number if not reproduced therein. The opinion after trial is designated "Op." Plaintiff-appellant's brief is referred to as "PB."

B. Background—The *Ripley* Litigation

In 1949, minority stockholder in IRCA commenced a derivative action, *Ripley, et al. v. International Railways of Central America and United Fruit Company*, against United and IRCA. (FF 8, I-256A). The *Ripley* plaintiffs who were represented by the same attorneys, with associated counsel, who have represented IRCA in the present litigation, contended that United, as a controlling stockholder of IRCA, had breached fiduciary duties owed to IRCA. (*Id.*). The ultimate issue in the *Ripley* case was whether the contracts between United or CAG and IRCA were fair to IRCA. (FF 9, I-256A).

On December 19, 1957, a judgment was entered awarding damages, with interest, exceeding 4.5 million dollars to IRCA representing increases in the contract rates payable by United and CAG for the carriage by IRCA of bananas and imported materials for the period prior to January 1, 1956. The judgment also increased the contract rates retroactively to December 31, 1955 and prospectively to the termination of the contracts. (FF 10, I-257A). The court held, at IRCA's request, that except for the rate changes, all of the agreements would continue in force and effect until they terminated pursuant to their terms. (FF 74, I-277A). A supplemental judgment was signed on March 1, 1961, which awarded IRCA an additional sum of almost 4 million dollars representing the increased rates for the period from January 1956 through December 1960 plus interest. (FF 10, I-257A).

On June 23, 1959, the Appellate Division affirmed the judgment, except reserved jurisdiction to the court. (FF 11, I-257A). The Appellate Division's order was affirmed by the New York Court of Appeals on December 1, 1960. (8 N.Y.2d 430). Counsel for the *Ripley* plaintiffs, and their retained accountants and experts, were subsequently awarded fees of more than 2 million dollars. (16 App. Div. 2d 260 (1st Dep't), *aff'd*, 12 N.Y.2d 814 (1962)).

C. The Present Litigation—Prior Proceedings

IRCA commenced this action against United in the Southern District of New York on February 16, 1965. (FF 14. I-258A).

A motion by United for partial summary judgment was granted by Judge Ryan. (254 F. Supp. 233 (S.D.N.Y. 1966)). On appeal, the Second Circuit affirmed Judge Ryan's decision that the four-year statute of limitations (15 U.S.C. § 15b) barred the antitrust claims arising before February 16, 1961. However, based on its conclusion that antitrust claims were not in issue in the *Ripley* case, this Court reversed the decision that the antitrust claims were barred by the rule against splitting a cause of action. (373 F.2d 408 (2d Cir.), *cert. denied,* 387 U.S. 921 (1967) (I-5A)). (FF 15, I-258A). On February 14, 1972, IRCA commenced this action against CAG, which was consolidated on the same day with the United Brands action.*

Defendants' motion for summary judgment was denied in part and granted in part by Judge Gurfein on May 8, 1973. (358 F. Supp. 1363 (S.D.N.Y. 1973) (I-33A)). With respect to the antitrust claims, the court held that the issue of plaintiff's standing, on which the motion was principally based, should be reserved for trial. On the contract claim, the court granted partial summary judgment holding that the contract obligating CAG to ship over IRCA expired on January 1, 1963, rather than in 1967 as plaintiff contended. (*Id.* at 1373-78 (I-43-48A)).

Trial commenced on January 23, 1974, and took place over 14 trial days ending on March 11, 1974. On April 25, 1974, the district court rendered a decision admitting into evidence 111 *Ripley* findings of fact. (FF 18-19, I-260-62A; Rulings at I-100A). On May 14, 1974, the court denied plaintiff's request for a further evidentiary hearing. (FF 20, I-262A; Suppl. Mem. Op. at I-118A). On January 29, 1975, Judge Gurfein rendered his decision dismissing the complaints and issued findings and conclusions. (Op. at I-193A, I-252A *et seq.*).

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* A previous action by IRCA against CAG, asserting the same claim, had been brought in the District of Massachusetts on October 9, 1968. That action was dismissed and the present CAG action commenced in order to have both the CAG and United Brands actions before the same court. (FF 16, I-258-59A).

D. The Claims

The essence of the First Claim against United was that it violated Sections 1 and 2 of the Sherman Act by requiring IRCA to discriminate in its rates and practices against other banana growers and that plaintiff was injured through the loss of profits it would have obtained from shipments by such other banana growers but for defendants' acts. (FF 22, I-263A).

The Second and Fourth Claims against United were previously withdrawn. (FF 21, I-263A).

The gravamen of the Third Claim was that United violated Sections 1 and 2 by cutting its production at Tiquisate during 1961 and 1962, by deciding in 1963 to close the Tiquisate division, and by imposing alleged restrictions for banana growing on those purchasing the land during liquidation of the division. Plaintiff claimed it was injured through the loss of profits resulting from loss of United's shipments and those of its competitors whose land use allegedly was restricted. (FF 23, I-263-64A).

The Sixth Claim asserted a violation of Section 7 of the Clayton Act resulting from the alleged utilization during 1961 of United's stock ownership in IRCA (originally acquired in 1928 and 1936 and sold in January 1962) to substantially lessen competition in the importation of bananas into the United States. The same injury was claimed as was alleged in the First and Third Claims. (FF 24, I-264A).

The contract claim involved an alleged breach of contract by CAG in failing to maintain a substantial volume of shipments of bananas from western Guatemala through 1963. This was the only claim against CAG, and United was sued on this claim (Fifth Claim) in its capacity as parent of CAG.

Statement of Facts

United operated two banana plantations in Guatemala. One, in an area around the town of Tiquisate (sometimes referred to as "Guatemala West"), was operated by United's wholly-owned subsidiary, CAG. (Op. at I-199A).

United's other area in the northeastern part of Guatemala was known as Bananera (sometimes referred to as "Guatemala East") (see FF 160, I-316A; FF 165, I-318-19A). The only other banana producer of any significance in Guatemala since at least as early as 1955 was Standard Fruit (FF 127, I-296A; II-806A), whose plantation was located some 70 miles west of Tiquisate. (FF 113, I-291A). Both CAG and Standard shipped their bananas across the country over IRCA's rail line to Puerto Barrios, an Atlantic port. There was no deep water Pacific port in Guatemala. (FF 5, I-254A; FF 87, I-284A). United also shipped bananas via IRCA for a shorter distance from Bananera to Barrios. (FF 165, I-318-19A).

Standard closed its Guatemalan plantation in November 1961 after it was completely destroyed by a hurricane. (Op. at I-207A, I-234A; FF 87, 91, I-284-85A). United decided to close its Tiquisate plantation in September 1963 (FF 210, I-338A) and completed its liquidation in about August 1964. (FF 5, I-254A). Standard, United and numerous other importers brought bananas into the United States from various other areas of Central and South America and the Caribbean, including Ecuador, Panama, Honduras and Costa Rica. (FF 27, I-265A).

First and Sixth Claims—The court found that plaintiff failed to prove the facts needed to support its First and Sixth Claims that United required IRCA to discriminate against United's competitors. (Op. at I-202-14A; FF 29-86, I-265-83A; FF 110-26, I-290-96A). Since the factual discussion of these claims relates principally to a failure of proof and does not lend itself to a narrative of events, we deal with them in the argument, Points III, V, *infra*.

Third Claim—The facts relating to the closing of Tiquisate are the subject of the Third Claim. In about 1960, shortly after Sunderland was appointed president, United faced poor and worsening financial results, evidenced by a sharp drop in earnings from $58.6 million a year in 1950 to $7.2 million in 1959. (FF 130, I-297A; Op. at I-216A). United's sliding profits were principally caused by the spread of Panama disease which attacked the roots of

banana plants and killed them. (FF 131(a), (b), I-297-98A; Op. at I-216A). The common strain of banana being cultivated at this time was the Gros Michel, which was so susceptible to the disease that once an area became infected, it had to be permanently abandoned. (*Id.*). As a result, United had abandoned some 925,000 acres and had to expend more than $22 million per year to clear new tropical areas for planting. (FF 131(c), (d), (e), I-298A). Panama disease was an important element in the deterioration of Tiquisate's banana growing operation. (Op. at I-216A).

While Panama disease was pushing costs up, competition from Ecuador was driving prices down. (FF 132, I-298-300A). Whereas United had to fund its own development of new planting areas, the government in Ecuador absorbed much of these expenditures in order to encourage the growing of bananas. (FF 132, I-298-99A). Importers could then purchase the bananas from local farmers in Ecuador without investing in development of plantations or risking the loss of such investment to Panama disease. (*Id.;* III-1286-87A; IV-A1707-08).

Sunderland decided to meet these threats to United's continued business existence by ordering a program of research which resulted in the development of a type of banana resistant to Panama disease known as the Valery. (FF 133, 134, I-300A; Op. at I-220A). The Valery could be planted on the old diseased acreage and had a higher yield. (FF 135(b), (c), I-301A). As a result, United no longer needed extensive lands for planting after abandonment due to Panama disease. (FF 135, 136, I-300-01A; Op. at I-221A). Sunderland evaluated the company's operations based on reports and recommendations of his staff, and decided to close down a number of divisions. (FF 137-145, I-301-05A). Tiquisate was included among the divisions to be phased out because it was the worst of the company-owned divisions in which to grow Valery and had a long history of unprofitable operations. (Op. at I-221A; FF 143-175, I-304-24A).

In liquidating Tiquisate, United did not place any restrictions on the future use of the land by purchasers. (FF 212, I-338A). Nor was it United's policy to refrain

from selling the land to banana growers. (FF 215, 216, 227, I-338-39A, 343A). Plaintiff did not prove that there were *any* offers to buy the Tiquisate land for bananas. (FF 219, I-340A). Moreover, the Guatemalan government did not encourage the use of land in western Guatemala for bananas; rather, when United decided to leave there, the Guatemalan Minister of Agriculture announced that he was "categorically opposed to having [the Tiquisate lands] turned over to the workers to continue with the banana plantations, as he was positive they would end in a complete downfall. . . ." (FF 220, I-340A). Instead, the Guatemalan government encouraged use of land for other purposes such as cotton or livestock, in order to assure the area's continued productivity and contribution to the country's economy. (*Id.*, I-340-41A).

United made affirmative attempts to sell Tiquisate to a banana producer, but the prospective producers were not interested in buying. (FF 227, I-343A). Thus, Mr. Sunderland and others at United had discussions with various prospective buyers all of whom expressed disinterest for reasons which led Sunderland to conclude that the Tiquisate division was not highly regarded by those who knew the banana business. (FF 228, 229, I-343-45A).

United also made a good faith but unsuccessful effort to negotiate a sale of Tiquisate with O. Roy Chalk, who was chairman of the IRCA board from 1963 to 1966. (FF 231-45, I-345-59A). Thus, United advised Chalk in January, March and August, 1963 that it intended to close Tiquisate when the division went into the red on a cash flow basis. (FF 234, I-347-48A; II-383A; II-709A). In August, United furnished Chalk with a copy of the consent decree entered in 1958 in a government civil suit against United pursuant to which United agreed to divest a division. (FF 234(d), I-348A). Chalk's reaction was that his interest was in buying "cheap" and that he had no means of financing. (FF 237(a), (b), I-350-51A). He also made demands on United for "top men" and other managerial personnel, a "fair share" of United's distribution system, and United's "new ships," in fact, "the best

of United's modern fleet"—demands described by the district court as "unrealistic." (*Id.*). (See Op. at I-226-27A).

In November, 1963 United sent Chalk information he had requested, including a breakdown of the Tiquisate assets and the range of price at which United would consider selling them. (FF 234(h), 235, I-348-49A). United also advised Chalk that "time is short" and that others were interested in acquiring certain assets of the Tiquisate division. (*Id.*). Nonetheless, Chalk did not then, or ever, make a firm offer to buy Tiquisate. (Op. at I-225-27A; FF 234(a), I-347A; FF 245(c), I-359A). Since the negotiations gave no indication of any sincere effort or desire by Chalk to acquire Tiquisate, Sunderland decided in January 1964 not to proceed further with Chalk, and United continued with the sales of Tiquisate land to others. (FF 243, I-357A; see FF 210-18, I-338-40A; Op. at I-227A).

Injury—The court found that plaintiff failed to prove injury by reason of alleged unlawful conduct of United. (Op. at I-213-14A, 234-37A; FF 87-109, I-284-90A; FF 127-28, I-296A). The factual omissions in this vital element are reviewed in Point IV, *infra*.

ARGUMENT

ANTITRUST CLAIMS

I

The district court's findings of fact that plaintiff failed to prove the critical elements of the alleged violations are not clearly erroneous.

During the 14-day trial, the court heard seven witnesses whose testimony encompassed a transcript of 2,045 pages; it received in evidence 435 plaintiff's exhibits and 358 defendants' exhibits (FF 18, I-260-61A); plaintiff proposed some 287 findings of fact; and defendants proposed 453, together with citations to the record. (Record Doc. Nos. 185, 187). Then, in addition to the numerous post-trial briefs (Record Doc. Nos. 107, 176, 177, 178, 183, 184), each side submitted a detailed response to the other's proposed findings, together with opposing record citations.

(Record Doc. Nos. 186, 190). From these submissions, the court prepared 245 numbered findings of fact of its own, plus additional findings included in its opinion. (Op., fn. 14 at I-250A). Since judgment for defendants was predicated almost entirely on factual grounds, the court found it unnecessary to determine many of the contested legal issues on which plaintiff would also have had to prevail to make out its case.* Rather, as to each antitrust violation alleged by plaintiff, the court found as a matter of fact that certain vital elements were not established.

Rule 52(a) of the Federal Rules of Civil Procedure provides that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In similar circumstances arising from alleged violations of Sections 1 and 2 of the Sherman Act, the Supreme Court held:

> "There is no case more appropriate for adherence to this [clearly erroneous] rule than one in which the complaining party creates a vast record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses." (*United States* v. *Oregon State Medical Society*, 343 U.S. 326, 332 (1952)).

The application of the clearly erroneous rule to the extensive findings made by Judge Gurfein is best illustrated in the context of plaintiff's principal claim on this appeal—that United willfully acted to acquire or maintain monopoly power in deciding to close Tiquisate and sell off the properties (*e.g.*, PB 107, 112, 122). (Of course, the rule is equally applicable to the findings on the other claims which are discussed in detail in later points.) The key issue on the claim relating to the closing of Tiquisate was the company's motive and intent in making its decision. Point II, *infra* at p. 18. Plaintiff urges that the decision was made in reprisal against IRCA for its success in the

* These legal issues are discussed at Point VI, *infra* at p. 61.

Ripley litigation* and that United deliberately precluded competitive banana producers from purchasing the land in order to suppress competition. (FF 23, I-263A). The district court's findings rejecting these allegations were based on testimony accepted as credible, as well as contemporaneous reports and studies.

Thus, United offered the testimony of Sunderland, its former President,** van Diepen, its Director of Research (IV-A1861), Mason, a former Comptroller and Assistant to the Vice President of Finance (Tr. 1489), and Fox, who was formerly Executive Vice President and later President. (IV-A1918-19). These witnesses all testified to the fact that Tiquisate was closed for legitimate business reasons stemming from United's need for less land as a consequence of the development of the higher yielding and disease-resistant Valery banana. (FF 133-39, I-300-03A; FF 143-44, I-304A). Sunderland explicitly denied that United had any motive to seek reprisal against IRCA or to suppress competition. (IV-A1797-98). The trial court thus found:

> "... I was impressed with the sincerity of Mr. Sunderland and the other UF witnesses. They testified lucidly about the difficult problems they were facing in the 1959-1964 periods, difficulties which arose independently of the *Ripley* lawsuit. In general, I credit their testimony as supporting the legitimate motive in abandoning the Tiquisate operation in favor of other operations in other countries and in Eastern Guatemala." (Op. at I-219A).

In an attempt to overcome these dispositive findings, plaintiff quotes from the opinion in *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 433 (2d Cir. 1945) (PB 89), omitting, however, the critical parts of Judge Hand's ruling that where a trial judge has accepted a wit-

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* As discussed in Point II, *infra* at p. 22, the motive of reprisal, even if proven, would have no antitrust significance.

** Mr. Sunderland is a distinguished lawyer, who formerly practiced at the New York bar and was one of the founders of the Antitrust Section of the American Bar Association. (IV-A1648-50).

ness's testimony on the issue of intent, that finding is "unassailable":

> "[W]hatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they 'must be treated as unassailable.' [Citing cases]. . . . Since an appellate court must have some affirmative reason to reverse anything done below, to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared. Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed 'unassailable,' except in the most exceptional cases." (*Id.*).

Plaintiff's quarrel with Judge Gurfein's findings as to the credibility of these witnesses is based principally on bits and pieces of documents quoted out of context. But, as this Court has recognized, particularly in a complex antitrust suit, a trial judge's findings cannot be undermined in this manner on appeal.

> "Plaintiff's astute and experienced counsel with commendable industry have collated a considerable number of words and phrases from the various documents in evidence from which it is deduced that the so-called 'facts' thus gathered together were 'either completely disregarded or unduly minimized in the findings' made by the trial judge, whose lengthy opinion is criticized as inadequate. But this reference to alleged omissions in the opinions of trial judges is more or less typical in antitrust cases when they reach the appellate stage; and we find no substantial basis for the charge here." (*Interborough News Co.* v. *Curtis Publishing Co.,* 225 F.2d 289, 294 (2d Cir. 1955)).

Accordingly, under the applicable appellate standards, the exhibits from which plaintiff quotes out of context do not undermine Sunderland's testimony or the findings based upon it as to the reasons for United's decision to close its Tiquisate division.*

Moreover, the court found that United "presented a mass of agronomic and financial evidence to establish that Tiquisate was a logical area to drop when the Valery banana came to the rescue of the Company because it was the worst of all UF's company-owned divisions in which to produce the Valery bananas." (Op. at I-221A). This mass of evidence included a contemporaneous study (the "Miller Report," III-1045-49A) comparing all divisions for this very purpose based on the relevant agronomic and financial factors. (FF 149-52, I-306-08A). The evidence also included other studies recommending the closing of Tiquisate (FF 144, I-304A), showing that it was a high cost division (FF 166-73, I-319-23A), and produced poor quality bananas (FF 169(b), I-322A; FF 174-75, I-324A). These studies were confirmed by still other regular business records showing the weaknesses of the Valery (*e.g.*, thin skin subject to bruising, sensitivity to temperature variations and shallow roots) in relation to the disadvantages of Tiquisate (*e.g.*, a long, rough railroad haul through cold mountains and tropical desert, as well as sandy volcanic soil). (FF 155-59, I-310-16A; Op. at I-220-21A).

Plaintiff devotes much of its brief to an attempt to retry the facts found against it by second-guessing United's executives and agricultural and financial experts in their selection of certain divisions to retain and others, including

* Illustrative are plaintiff's quotations out of context from a letter by Sunderland in 1961 agreeing generally with the conclusions of a retired manager (II-429A) and a letter by Fox in 1962 (PX 20) (PB 70, 88). Plaintiff omits the facts that Fox's letter and the letter to which Sunderland was responding (II-430A) (a) assumed the possibility of "shipping west," *i.e.*, through a new port to be constructed on the Pacific side of Guatemala which later studies proved to be impractical (PB 17; FF 164-65, I-318-19A; FF 182(1), (2), I-326A; PX 620, PX 711); and (b) were premised on the assumption that Cocos bananas—another species with which the company was experimenting—would be wind-resistant and immune to Panama disease, which later proved to be erroneous. (FF 188, I-328-29A).

Tiquisate, which they decided to close as part of the conversion to the Valery banana. (PB 65-93). The purport of this belated attempt to poke holes in the mass of evidence supporting United's decision to close Tiquisate is, as the trial court said, that "all the testimony and documentary evidence presented by the defendants in support of their position that Tiquisate was closed for legitimate business reasons could have been for the purpose of fabricating a fictitious excuse for the ultimate decision . . . ." (Op. at I-219A). The trial judge explicitly refused to so find, and instead determined that "the testimony concerning action taken on the basis of the reports was straightforward." (Op. at I-222A). Plaintiff's effort to undermine this finding must fail under the test applied by the Supreme Court in affirming the dismissal of Sherman Act charges:

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent [citing cases]. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'" (*United States* v. *National Association of Real Estate Boards,* 339 U.S. 485, 495-96 (1950)).

Plaintiff concentrates its attack on the finding that one of the many agronomic and financial reasons for closing Tiquisate was the belief, reflected in contemporaneous documents, that this division would have the highest costs of production and shipment ("landed cost") for the new Valery banana of all United's company-owned divisions. (FF 153-54, I-308-10A; FF 172, I-323A; III-1047-49A; IV-A1729-30). To support its argument in this regard, plaintiff incorrectly states that the court "accepted" its so-called adjusted landed cost figures. (PB 66).* In fact,

* Plaintiff's proposed findings based on its reconstruction of various cost documents (Pltf.'s Prop. Fdgs. 173-78, Record Doc. No. 185, pp. 88-91) were not adopted by the court. (Op. at I-222A). PX 1108 (II-753A), on which plaintiff relies to prove cost figures different from the Miller Report (PB 66), is a single unsigned sheet of paper with no indication of its purpose or assumptions. There was

(footnote continued on next page)

Judge Gurfein simply ruled that "assuming" the figures to be accurate:

> "there is no showing that Sunderland knew this, agreed with it, or had reason to doubt the Miller Report which showed Tiquisate to be the worst division." (Op. at I-222A).

Plaintiff's only answer to this finding is that Sunderland should have been aware of certain allegedly invalid assumptions on which it contends United's contemporaneous cost estimates were predicated (PB 69). But Sunderland could not conceivably have known about plaintiff's post-hoc criticisms.

In short, Sunderland had no reason to distrust the scientific assumptions and conclusions of his staff of experts. One of them, Mr. van Diepen (University of Toronto, B.S., Louisiana State University, M.S. in Agronomy, and United's Director of Research (IV-A1859, A1861)), testified as to the validity of the assumptions and pointed out the scientific errors in plaintiff's so-called "adjustments." (Tr. 1406-09; 1419-21; 1478-81).* Plaintiff offered no opposing expert testimony of its own. The Supreme Court has recognized that Rule 52(a)'s admonition to give due regard "to the opportunity of a trial court to judge of

no evidence that these data were sent to or considered by Sunderland. Mason testified that this material was not created or used for the purpose of making decisions as to the locations in which to plant Valery or the divisions to be closed, and that from his review of the file, the Tiquisate study on which plaintiff relies contained only preliminary data which were never submitted to anyone. (Tr. 1981-84). Plaintiff, without foundation, attempts to compare the figures on this sheet with figures from different sources which may well have been prepared on different bases.

* Plaintiff was faced with two reports (corroborating the conclusion of the Miller Report) which estimated that Tiquisate's cost for Valery was higher than that for Honduras. (III-1363-67A; III-1368-77A). In order to reach the opposite conclusion, plaintiff argues that Tiquisate had a higher yield per acre than Honduras which the cost analyses failed to account for. (PB 67-68, 75). But contemporaneous documents show on their face that Honduras had higher yield. (III-1126A; 1133A; 1170A). Plaintiff disagrees with the scientific assumptions of these reports but is faced with van Diepen's expert testimony which supports the reports. (Tr. 1406-09; 1419-21; 1478-81).

the credibility of the witnesses" is in no case "more appropriately applicable than . . . where the evidence is largely the testimony of experts . . . ." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 274 (1949). Accordingly, the conclusions of United's experts, that Tiquisate was unsuitable for the Valery banana, firmly supported the district court's findings on the propriety of United's motive for closing that division.

As we shall demonstrate in the discussion of each of plaintiff's claims in the following points, the court's dismissal was predicated on detailed factual findings, supported by both credible testimony and documents which are unassailable and plainly not "clearly erroneous."

II

The court properly found that United's closing of its Tiquisate Division was not in willful maintenance of monopoly power.

Plaintiff begins its argument with the substance of its Third Claim—that United's decision to close its western Guatemalan plantation ("Tiquisate") in August 1964 was an act of monopolization in violation of Section 2 of the Sherman Act. (PB 107).* The Supreme Court has defined the legal elements of a Section 2 violation as follows:

> "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." (*United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

Monopoly power is "the power to control prices or exclude competition." (*Id.* at 571).

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* Section 2 makes it an offense for any person to "monopolize . . . any part of the trade or commerce among the several States, or with foreign nations . . . ." (15 U.S.C. § 2).

Judge Gurfein dismissed IRCA's monopolization claim without deciding whether it had proved the first element of the offense.*

To establish the second element of the offense, the willful acquisition or maintenance of monopoly power, it is essential to prove that the monopolistic acts were committed with the intent or purpose to monopolize. Thus, for example, in *Grinnell,* this element was established by proof of "unlawful and exclusionary practices" by which "monopoly power was consciously acquired." (384 U.S. at 576 & n.7).** Accordingly, Justice Douglas found that defendant's "empire building" was "done plainly and explicitly for a single purpose." (*Id.* at 571). Similarly, the Supreme Court held in *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809 (1946), that the crime of monopolizing under Section 2 requires proof of both "power . . . to exclude actual or potential competition from the field and . . . intent and purpose to exercise that power." Recently, the requirement of intent was held essential in *Kreager* v. *General Electric Co.,* 497 F.2d 468, 471 (2d Cir.), *cert. denied,* 419 U.S. 861 (1974), where this Court stated that "[i]t is axiomatic that '[i]n order to fall within § 2, the monopolist must have . . . the intent to monopolize' the relevant market. United States v. Aluminum Co. of America, 148 F.2d 416, 432 (2 Cir. 1945)."

A. The Closing of Tiquisate

Judge Gurfein held that plaintiff did not prove that the closing of Tiquisate was either intended to exclude or had the effect of excluding competition from the importation of bananas into the United States or enabling United to control prices in that market. (CL 6, I-361A).

* This issue is reviewed briefly in response to plaintiff's arguments. (Point VI(A), p. 61, *infra*).

** Specifically, Grinnell had not only acquired some 30 competitors, but also entered into agreements with the sellers not to compete and to allocate territories. The Court found that these acts "perfected the monopoly power to exclude competition and fix prices." (384 U.S. at 576).

The trial court explicitly concluded, based on detailed factual findings, that the closing of the Tiquisate division was not "an act in maintenance of monopoly power" (CL 5, 11, I-360-61A, 363A). Rather, United's motives were "to close down those divisions less suited for the production of Valery because it required less land, and to transfer United's Guatemalan production from the West Coast to the East Coast which was closer to port and where abandoned Panama diseased land was available for Valery production." (CL 5, I-360-61A). See Statement of Facts, p. 8, *supra*.

The decision to close Tiquisate was made by United's president, Thomas E. Sunderland, based on in-depth analysis that is reflected in detailed reports prepared by technical personnel on which the court relied for its findings. (FF 143-48, I-304-06A). Thus, for example, the Miller Report, authored by experts in agriculture and finance, "ranked Tiquisate as the worst division in which to grow Valery bananas." (FF 149, 151, I-306-07A). This conclusion, and the court's parallel findings, were derived from numerous facts and figures proving that, among other things, there was a long haul from Tiquisate to port on which the more sensitive Valery bananas would become bruised, chilled and overripe. (FF 159, I-313-16A). Compared to other divisions, Tiquisate had higher estimated costs, an expected lower yield per acre due to poor soil and the worst wind conditions, an adverse political situation, a history of unprofitable operations, and poor quality labor. (FF 143-75, I-304-24A; Op. at I-219A, 221-22A). These findings and conclusions were based on evidence that United adduced supporting the legitimate need for closing Tiquisate, and the court found "no accumulation of circumstantial evidence preponderant enough to overcome the testimony and exhibits" in this regard. (Op. at I-222-23A).

Alleged Boycott—Faced with indisputable findings based on overwhelming evidence, plaintiff tries to get by in its legal argument by using catch phrases, such as "boycott" and "price squeeze." (PB 112-18). In none of the cases from which plaintiff extracts these phrases, however,

did the court find that the closing of operations in an area for legitimate business reasons constituted monopolization. To hold that such a closing is a per se illegal boycott, as plaintiff contends, would mean that a business enterprise must continue all aspects of its operations without regard to their economics because to do otherwise would constitute, as a matter of law, a boycott of all suppliers of services and materials to the closed operation.

As a matter of fact, United did not refuse to purchase IRCA's railway service. It continued to use the railway to transport bananas from Bananera in northeastern Guatemala to port until 1972 when it sold that division to Del Monte. (FF 163, 165(a), (b), I-318-19A; III-931A). United's lesser need for rail services in Guatemala resulted from the closing of the West Coast division as part of the company's conversion to a new type of banana for which this region was not suited. Under no stretch of the imagination can this be deemed a boycott as that term is used in the Section 2 cases relied on by IRCA.*

For example, in *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927) (cited at PB 112), the Supreme Court held that it could not overturn as a matter of law a jury finding of intent to perpetuate a monopoly where Kodak unsuccessfully sought to acquire plaintiff—a wholesaler of photographic materials—and then refused to sell to plaintiff at wholesale prices, thus putting plaintiff at a disadvantage with other competitive dealers that Kodak had successfully acquired. In *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951), the trial court found "unequivocally" that a newspaper publisher's refusal to accept advertisements from customers who also advertised on a competitive radio station "was aimed at . . . the complete destruction and elimination" of the radio station in order to restore the newspaper's monopoly in the local advertising field.

* The court found that United never asked anyone not to deal with IRCA (CL 2, I-359-60A), and therefore the cases cited which hold concerted refusals to deal to be unlawful are also inapplicable. (PB 113-18).

Here the district court found that, unlike the cases on which plaintiff relies, the closing was not "aimed" at IRCA since, among other things, there was a company-wide policy, based on the Valery development, to close a number of divisions and sell off land in others. (CL 13, I-363-66A; FF 136-37, I-301-02A; Op. at I-228A). Therefore, it could not have been intended as a boycott of IRCA. (CL 2, I-359-60A). In addition, unlike the plaintiffs in *Kodak* and *Lorain Journal,* IRCA was not a competitor in the allegedly monopolized market so that even if the closing was aimed at IRCA, it would not necessarily exclude competition in the banana business. Indeed, accepting arguendo as the court did, the alleged market for importation of bananas into the United States solely from Guatemala (Op. at I-215A), the closing down of operations on the western side of Guatemala can hardly be deemed an act which enlarged or even maintained United's position in the assumed relevant market; to the contrary, it narrowed the scope of its operations there. Accordingly, the closing was not in maintenance of an alleged monopoly.

Alleged "Price Squeeze"—Plaintiff also urges that United's attempt "to beat down IRCA's charge for transportation services," accompanied by an alleged threat of abandonment of the Tiquisate plantation, constitutes application of "a price squeeze on a supplier of transportation service." (PB 114, 118). Once again, plaintiff's assertion is belied by Judge Gurfein's contrary findings. The court found there was no promise by United that even if rates were lowered, Tiquisate would continue as a banana operation in light of the agronomic problems in that location, of which IRCA was informed. (Op. at I-217A). Based on the adverse natural factors affecting banana cultivation, the court concluded that "The overwhelming facts leading to the decision to close Tiquisate pertained not to the IRCA freight rate but to Tiquisate's disadvantages in the production of Valery compared to other divisions . . . ." (CL 13(e), I-364A).

Moreover, plaintiff cites no case holding that an attempt to bargain down a price sought by a supplier of services can be considered a monopolistic act as a matter of law.

The logical consequences of such a rule would require any firm with a large market share to pay whatever prices a supplier asks even where, as Judge Gurfein found in the case of IRCA, that supplier's demands may result from the fact that it is itself a monopoly. (Op. at I-218A; FF 2, I-253A).

The term "price squeeze," as used in a Section 2 context, has its origin in *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 436-38 (2d Cir. 1945) (cited at PB 112), where the Court held that it was an unlawful exercise of monopoly power for Alcoa (both a supplier of raw ingot to manufacturers of aluminum sheet and itself a manufacturer of sheet) to drive its competitors in the manufacture of sheet out of business by first charging them unfairly high prices for ingot they needed to make the sheet, and then undercutting their sheet prices. This practice bears no resemblance to United's bargaining with IRCA for the price of railroad services.

Nor is *United States* v. *Griffith*, 334 U.S. 100 (1948) (cited at PB 112-16), analogous on this point. That was one of a line of motion picture antitrust cases in which the Court found that theatre owners unlawfully used their monopoly power in towns where there were no competitive theatres by demanding exclusive film rights in towns where other theatres were present, thus foreclosing the competitive theatres from receiving films and competing. Here again, the distinctions are numerous—United and IRCA are not competitors; United sought a reduced rate, not an exclusive right; and most important, competition was in no way foreclosed by United's bargaining on rates. United only sought a lower rate, not a rate that favored it over competitors. (Op. at I-223A).

Alleged Reprisal—Plaintiff devotes much of its brief to its attempt to prove that "[b]ut for United's *reprisal* for *Ripley,*" United would have continued to produce bananas at Tiquisate. (PB 49, 107). Again, the facts as found by the trial judge completely dispose of plaintiff's point. The trial court rejected the alleged reprisal motive because affirmative evidence established that other motives, principally involving the conversion to the Valery banana, prompted the liquidation of Tiquisate. (Op. at I-228A).

The court's finding that United lacked any intent to seek reprisal against plaintiff is unassailable. (Point I, *supra*).

Moreover, as a matter of law, reprisal has no bearing on whether an antitrust violation has been committed since it has nothing to do with suppression of competition which the antitrust laws are designed to guard against. As this Court held in *House of Materials, Inc.* v. *Simplicity Pattern Co.*, 298 F.2d 867, 870 (2d Cir. 1962), there was no violation of the antitrust laws despite the finding of the district court that:

> "[T]he sole motivation for [the defendant's] refusal to deal with the plaintiffs below was its desire to retaliate for the treble damage action brought against it by those plaintiffs." (*Id.* at 869).

Thus, this Court held that a termination of dealings, however malicious the intent, was insufficient to make out an antitrust violation absent facts necessary to fulfill the elements of a Sherman Act infraction.* (*Id.* at 870-71). Here, unlike *House of Materials,* the lawsuit for which reprisal is alleged was not even an antitrust case. Plaintiff claims that United acted in retaliation against a state court judgment for breach of fiduciary obligation. The contention that United's actions were contrary to Referee Hammer's admonitions in *Ripley* (PB 13-14) has no relevance to a claim under the federal antitrust laws.

B. Disposition of Tiquisate

Plaintiff itself recognizes in its brief that to constitute unlawful abuse of monopoly power, the closing of Tiquisate must have been used "as a means of United's maintaining its monopoly or foreclosing competition." (PB 112). See

* Other cases have held that an intent to injure will not transform into antitrust violations acts that otherwise lack the proscribed anticompetitive purpose and effect. Hunt v. Crumboch, 325 U.S. 821, 824-26 (1945); Dart Drug Corp. v. Parke, Davis & Co., 344 F.2d 173, 186 n.6 (D.C. Cir. 1965); Harrison v. Prather, 435 F.2d 1168, 1176 (5th Cir. 1970), *cert. denied,* 404 U.S. 829 (1971). See also cases cited at p. 70 n., *infra.*

Coniglio v. *Highwood Services, Inc.*, 495 F.2d 1286, 1293 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974). Thus, plaintiff contends that United not only closed Tiquisate but "foreclosed potential competition from taking it over." (PB 122). The facts found by the district court are precisely to the contrary.

Prior to closing the division, United leased some of the land at Tiquisate as a means of putting it in productive use, thus avoiding squatters and government agrarian reform takeover. (FF 189-95, I-329-32A). United had no general policy, as plaintiff asserts (PB 39), to prohibit banana growing on land it was leasing or selling. (Op. at I-224A). Plaintiff did not prove that United ever refused to lease land for banana growing, or that any lessees had the intent or capacity to grow bananas. (FF 199, I-334A). All of the leased land was eventually sold in the liquidation of Tiquisate without any restrictions on its future use. (FF 196, 212, I-332A, I-338A; Op. at I-224A).

The district court rejected plaintiff's assertion that United acted in furtherance of monopolization in its disposal of the Tiquisate land. (Op. at I-222-24A, 227A). It accepted Sunderland's testimony, which was consistent with the documentation, that United did not place any restrictions on the future use of Tiquisate land by purchasers. (Op. at I-224A; FF 196, 212, I-332A, 338A; Tr. 1124). Sunderland's testimony, as reflected in the court's findings, also established that United did not have a policy to refrain from selling Tiquisate to a banana producer; those responsible for United's land disposal were not instructed to refrain from selling land to banana growers; and the availability of the land was publicized. (FF 215-17, I-338-39A; FF 227, I-343A). The fact is, as the court found, that no one offered to buy the Tiquisate land for bananas, and there were no purchasers with the intent, preparedness and capacity to produce bananas at Tiquisate. (FF 213-14, I-338A; FF 219, I-340A). The same adverse agronomic conditions that persuaded United to close the division, encouraged the land buyers to grow other products, such as

cotton, which were not subject to destruction from Panama disease, windstorm, bruising in rail transportation and the like. (FF 218, I-339-40A; Op. at I-225A).

As Sunderland testified and the court found, United made affirmative efforts to sell Tiquisate to a competing banana producer, but they were of no avail. (FF 227-29, I-343-45A; Op. at I-225A). United's unsuccessful efforts to sell to its major competitors, Ecuadorian Fruit Co. and West Indies Fruit Co. are reflected not merely in testimony (IV-A1802-03) but also in contemporaneous documents (II-767-97A; III-1139-40A). IRCA argues that United "did not try to sell Tiquisate to Ecuadorian" (PB 38); but the court recognized that even though a memorandum indicated that no division was specifically mentioned in United's offer, none was excluded; Ecuadorian was informed that United would "consider all prospective bidders" and United allowed the buyer to choose the area it desired. (FF 229(b), I-344A). Moreover, Ecuadorian had earlier rejected any interest in buying Tiquisate on the ground that bananas could not be "grown profitably there to be sold competitively in the United States" (FF 229(a), I-344A; IV-A1803)—the same conclusions reached by United's own experts when it later decided to close the division. (FF 167-68, I-319-21A).* United could not sell to its largest competitor, Standard Fruit (even if that company wanted to reenter western Guatemala after having been driven out by a devastating hurricane), because of an express prohibition in an antitrust consent decree entered in 1958. (FF 230, I-345A).**

* IRCA's only response to the West Indies Fruit Co. negotiation is that the precise "prospectus" furnished the buyer was not produced (PB 133) (because it was not extant in that form). However, the financial data and studies prepared for such purposes were furnished in detail and marked by plaintiff as an exhibit in its attempts to prove some of the advantages of the Tiquisate location. (II-753A). (See FF 228, 229(d), I-343A, 345A).

** Such a sale, and not the three excluded letters of pleasantries between the presidents of United and Standard (cited at PB 104, fn.) is what Sunderland explained was prohibited by the consent decree. (IV-A1802-03).

The only other possible buyer was O. Roy Chalk, an entrepreneur who was Chairman of IRCA and negotiated on behalf of some undisclosed syndicate. (FF 233(a), I-346A). United presented the history of these negotiations in detail through the testimony of its officers, Sunderland and Fox, together with memoranda reflecting each of the parties' contacts. Chalk did not testify, although his deposition testimony touched on the matter. The trial court made extensive findings from which it concluded that Chalk was "reluctant"; that he never made a firm offer; that he "was slippery in the negotiations"; that he made "unreasonable" demands; and "[h]e did not come up either with a total price or a means of independent financing." (Op. at I-225-26A; FF 231-45, I-345-59A). Contrary to plaintiff's assertion (PB 130), the district court found that "[t]hroughout the negotiation, United had made a good faith effort to sell Tiquisate to Chalk." (FF 245, I-358-59A; Op. at I-227A). United supplied Chalk with detailed data concerning Tiquisate which Chalk requested, and provided him with dollar figures indicating the price bracket from which negotiations could begin. (*Id.*).* United promptly answered Chalk's inquiries and followed up with telephone calls when United's responses were ignored. (FF 245(c), I-358-59A).

Of all the many reasons ascribed by the court to United's inability to sell Tiquisate to Chalk, plaintiff attacks the legitimacy of only one—the failure of such a sale to meet the requirements of the consent decree which ordered United to divest a division. Sunderland justifiably believed that a sale to Chalk would have failed to comply with the decree, for example, because of the Justice Depart-

* As the trial court recognized, United described Tiquisate to Chalk as favorably as it could consistent with United's determination that Tiquisate, while possessing some advantages, was the worst area compared with United's other divisions which it decided to retain. (FF 143, I-304A; FF 245(d), I-359A). Chalk was told of Tiquisate's agronomic problems as well as its few advantages (*id.;* Op. at I-217A; II-383A; II-709A; III-1276A), and the court expressly found that no affirmative misrepresentations were made to him. (Op. at I-225-26A).

ment's doubts as to whether Chalk was an "eligible person" or Tiquisate was a viable division. (FF 241, I-353-55A). Plaintiff urges that United should have sold the lands without receiving credit under the decree. But the court found, in accord with the contemporaneous memoranda, that "Chalk was only interested in proceeding under the decree because [*inter alia*] he did not have the financial capability to make an outright purchase of Tiquisate assets . . . ." (FF 240, I-353A; III-1220-22A). Accordingly, the failure to meet the decree's requirements was an additional, non-monopolistic reason for United's decision to refrain from further pursuing a sale to Chalk.

In any event, United's decision in January 1964, after almost six months of fruitless negotiations, not to proceed further with Chalk was predicated on Sunderland's view, expressed in his testimony, that the "negotiations gave no indication of any sincere effort [by Chalk] to want to acquire Tiquisate property"; and Judge Gurfein accordingly found that the chance of a deal was remote through no fault of United. (FF 243, I-357A; Op. at I-227A). The court also accepted Sunderland's conclusion that having decided to close the division, United had to proceed promptly in order not to risk adverse government action and labor strikes against the operation it was maintaining in northeastern Guatemala, as well as the loss of opportunity to obtain valuable consideration for the Tiquisate land which was then in demand for cotton growing and other purposes. (*Id.*).

The district court also found that Chalk's lack of intent to enter the banana business in western Guatemala was evidenced by his failure to purchase lands other than Tiquisate or to repurchase lands committed by United to others. (FF 244, I-357-58A). Plaintiff says Chalk could not make such repurchases because of an alleged policy by United to remove irrigation and other equipment. (PB 132). However, the court found that the Tiquisate farms in fact "contained the necessary irrigation pipe and other equipment" at the time United was negotiating with Chalk and for some time thereafter because United continued to produce bananas on the land until August 1964, some eight

months after the Chalk negotiations aborted. (FF 244(c), I-358A).* Chalk also failed to purchase other vast acreage in western Guatemala which was not owned by CAG and which was available, including the land on which Standard had previously grown bananas. (FF 244, I-357-58A).

In sum, the evidence established that Sunderland and Fox pursued negotiations with Chalk in meetings and telephone calls, and submitted data to Chalk over a period of almost six months even though Chalk made unrealistic demands and never made a firm offer. (FF 245, I-358-59A). On the basis of this record, the court was correct in finding that the deterioration of the Chalk negotiations was not United's fault. (Op. at I-227A).

Plaintiff also contends that United sought to foreclose competition from taking over Tiquisate by allegedly removing irrigation equipment and some railroad trackage. (PB 39, 123-24). Judge Gurfein, however, explicitly rejected this contention as a matter of fact based on the testimony and contemporaneous memoranda. (FF 221-26, I-341-43A). Thus, the court accepted Sunderland's testimony that United in fact sold Tiquisate agricultural equipment to the land purchasers who wanted it. (FF 222, I-341A). Land purchasers often did not desire or offer to buy the expensive equipment because they planned to grow cotton, which required no irrigation equipment. (FF 223, I-341-42A).** In short, having made affirmative good faith but unsuccessful efforts to sell Tiquisate to a banana producer, United had legitimate business reasons to remove valuable equipment that was not wanted or needed by other land pur-

* Chalk refused to offer to pay for the equipment in any event and, as contemporaneous memoranda and letters establish, he was willing "to discuss" only expending $100 an acre, which was the minimum price United was getting from others for land alone without this valuable equipment. (FF 239, I-352-53A). For the same $100 an acre, Chalk also wanted distribution facilities, management personnel and ships as part of a divestiture under the consent decree, as well as the assets other than land located at Tiquisate. (*Id.*).

** United's laudable intentions were also evidenced by documents proving that its Tiquisate subsidiary (CAG) left intact the major facilities such as hospitals, telephones, drinking water, workshops and other facilities United had created. (FF 226, I-343A).

chasers, and to transfer it to its plantations on the eastern side of Guatemala where it was needed to convert to the new Valery type of banana. (FF 224, I-342A). United had advised the Guatemalan government that it would use these assets to expand the Bananera plantation, and thus provide benefits to the country's economy even though it was closing a division there. (*Id.*). The court's findings that United's conduct in this regard was not to prevent competitive banana production are thus firmly supported by the evidence. (FF 221, I-341A).

C. Other Contentions on Intent to Monopolize

Plaintiff also asserts that United closed Tiquisate to use an alleged monopoly position in Central America "to beat the independents from Ecuador and thus, to monopolize the United States market." (PB 125).* Plaintiff relies on the court's finding that United's development of the higher yielding Valery and the concomitant decision to close down various operations including Ecuador and Tiquisate was in the "hope" of competing more effectively against independent shippers from Ecuador. (FF 139, I-302-03A).**

Far from evidencing intent to monopolize, United's crash research into the development of a Panama disease-resistant variety and its decision to reduce costs by closing unneeded divisions was an effort to extricate the company from a condition of serious and deepening financial

* The Court neither found nor assumed arguendo that bananas from Central America, excluding South America or the Caribbean, was a relevant market. Such an assertion is inconsistent with the facts found. See Point VI(A), *infra* at p. 62. (See Op. n.13 at I-250A).

** Inconsistently, plaintiff also challenges (PB 42) United's earlier purchases in Ecuador, which were not for anticompetitive reasons, but rather as a stop gap source of supply in order to remain in business pending the gradual transition which was necessary from the Gros Michel to the Valery. (FF 186, I-328A). Plaintiff's post hoc cost analysis overlooks the extremely large investment in new plantings that United would have had to make. (FF 102, I-288A; Tr. 1951-52). For this reason, bananas could be purchased in Ecuador where no investment was required at a lower cost than United could produce them in Tiquisate or elsewhere. (FF 132, I-298-300A).

distress. (FF 130, I-297A; Op. at I-216A). United's costs were rapidly rising, causing earnings to drop sharply, due to the higher costs needed to develop new planting areas to replace those infected with Panama disease. At the same time, prices were falling due to heavy competition from Ecuador, where the government was absorbing development expenditures for local growers. Statement of Facts, *supra* at p. 8. It was in this context that, as the court put it, "Sunderland was required to find a solution to the economic difficulties of the company as a whole," rather than seeking ways to maintain alleged monopoly power. (Op. at I-216A).

As was recently held in dismissing a Section 2 claim, where defendant reacted to competitive erosion of its market position, "to prohibit such actions is to protect the others in the market from ordinary competition" and would be "an incorrect interpretation of [the] law." *Telex Corp.* v. *International Business Machines Corp.*, 510 F.2d 894, 927 (10th Cir. 1975). As a matter of law, "the consequences of a superior product," *i.e.*, the Valery banana and "business acumen" are not monopolistic. *United States* v. *Grinnell*, 384 U.S. 563, 570-71 (1966).*

Finally, IRCA presents the novel proposition, for which it cites no authority, that the legality of United's conduct should be judged by its results so that an increase in market share is in itself proof that preceding business actions had a monopolistic purpose. (PB 126). In fact, there was no proof that the changes in United's share in the market for importation of bananas into the United States were, in the context of the overall operation of the company, attributable in any way to the closing of a single division. Moreover, plaintiff did not prove that the closing of Tiquisate resulted in an increase in market share; to the contrary, even accepting arguendo IRCA's figures, United's share of the market for importation of bananas into the United States dropped from 55% to 48.1% to 42% during 1963 and 1964 when Tiquisate was being phased

* In any event, IRCA would have no standing to claim injury from an action aimed at Ecuadorian competitors. (See Point VI (E), *infra*, at p. 67).

out and closed.* (PB 126; PB App. G). The following year saw a rise back only to the 1963 level of about 48.5%. In subsequent years, the share hovered between 53% and 55%—well below the level in the years 1935 to 1961; and not within monopoly range under the applicable case law. (See p. 63, *infra*). The trial court cannot be faulted for failing to infer willful maintenance of monopoly power from these abstract statistics alone.

In conclusion, there has been a total failure of proof on one of the two essential elements of plaintiff's claim of monopolization as defined by the Supreme Court in the legal discussion presented at the outset of this Point. Plaintiff has failed to prove that United willfully committed any unlawful acts with the requisite intent to promote a monopoly. To the contrary, the court found on the basis of testimony and documents offered by defendant that its intent in closing Tiquisate was a reaction to severe agronomic problems, particularly Panama disease and windstorms, which led to the development of the Valery banana and the closing of divisions that were least suited to the cultivation of that variety. (Op. at I-221-22A). Plaintiff also failed to prove that the closing of Tiquisate was either intended to exclude or had the effect of excluding competition from the importation of bananas into the United States or enabling United to control prices in that market. (CL 5, 6, I-360-61A). To the contrary, the court found that United made good faith efforts to sell the land for banana cultivation, but that buyers were not interested because of blowdowns, the lack of government support, and other agronomic and financial factors. (Op. at I-224-25A).

Accordingly, the court's finding that United did not willfully acquire or maintain monopoly power should be affirmed as being completely supported by the record and not clearly erroneous.

* United submitted market share data that were different. (III-939-40A). The court did not resolve the conflict because it was unnecessary to reach the issue of whether monopoly power could be inferred from market share since there was no proof of the other essential element—willful maintenance of monopoly power. (Op. n. 13 at I-250A; CL 5-7, I-360-61A).

III

The court properly found that United did not engage in any contract or conspiracy to suppress competition.

Plaintiff urges reversal of the findings that United did not engage in any unlawful contract, combination or conspiracy in violation of Section 1 of the Sherman Act. (PB 138). In support of this alleged violation, plaintiff relies principally on its First Claim in which it charges that United required IRCA to engage in discriminatory rates and practices. (FF 22, I-2 6A).

A. The Absence of Contracts in Restraint of Trade

Plaintiff first contends that such discrimination was required by United in its contracts with IRCA. (PB 139). The district court expressly found that "IRCA was not contractually obligated to discriminate in favor of CAG and United against their competitors." (FF 61, I-274A). Corroboratory of the plain meaning of the contracts that were in evidence (II-658-89A) was the fact that the 1958 consent decree prohibited contracts in which United required any common carrier to discriminate against other shippers. (Op. at I-203A; FF 62, I-274A; III-1230A, ¶VI (A)(9)). Immediately following the entry of the decree in 1958, Inzer Wyatt, then counsel to IRCA, together with the firm representing the *Ripley* plaintiffs,* as well as United's counsel, independently studied the relevant contracts and found no provisions requiring such discrimination by IRCA. (Op. at I-203A; FF 62-66, I-274-75A).

Moreover, the continuation of the contracts after the *Ripley* judgment in 1957 was not caused by United. It was IRCA who urged the New York State courts in the *Ripley* case to order the relevant contracts to continue in force in their original form (except for the line haul rate which plaintiff does not challenge). (PB 94-95; FF 65, I-275A; FF 74, I-277A; FF 122-23, I-294A). Nor did

* IRCA's present attorney was co-counsel for the *Ripley* plaintiffs.

IRCA ask United to alter or amend these contracts (FF 68, I-276A; FF 74, I-277A).

Plaintiff claims that the district court, in finding no contractual obligation to discriminate, "overlooked" a provision relating to the use of railroad equipment leased by IRCA from United's subsidiary CAG. (PB 142). However, there are express findings concerning this provision to the effect that the parties treated the leasing arrangements as bona fide and indeed, plaintiff's counsel conceded that CAG owned the railroad cars in question. (FF 69, I-276A). It is not discriminatory to make arrangements with a railroad to provide transportation services on the shipper's own freight cars. There is no evidence that Standard Fruit or any potential competitor was precluded from making the same arrangements for the use of its own cars. (FF 96, I-286A). Thus, the court found that "IRCA was entirely free to allocate all or any part of its own banana cars and locomotives to others, or to buy more equipment or to operate others' equipment if necessary." (FF 86(d), I-284A; FF 122, I-294A).*

B. The Absence of Conspiracy Through Alleged Stock Control

The second aspect of plaintiff's conspiracy claim is that United exercised control over IRCA, through the ownership of a block of stock, to require IRCA to discriminate against competitors. (PB 139, ¶1(b)). United sold its IRCA stock

* The *Ripley* plaintiffs' counsel, who was co-counsel in this case at trial, advised the *Ripley* judge: "If we get fair rates on bananas, we don't make any complaint about the equipment arrangement . . . ." (*Ripley* Transcript, p. 18,934, June 15, 1955 (cited in Record Doc. No. 178, p. 20)). Accordingly, the *Ripley* judgment provided that there was "no determination . . . as to ownership, now or in the future, of the locomotives and banana cars furnished to International Railways of Central America under the contract with Compania Agricola de Guatemala." (FF 69(c), I-276A). Moreover, the allegation (PB 96) that the leasing arrangements in 1936 were "a facade" to "disguise" low rates was cured by the *Ripley* judgment which raised the rates to an amount concededly nondiscriminatory. (PB 94-95). Thus, the *Ripley* findings as to the situation in 1936, on which plaintiff relies, are in this case a "red herring," having no bearing on the post-*Ripley* arrangement which was regarded as bona fide and nondiscriminatory by IRCA, the *Ripley* plaintiffs, United and CAG. (Op. at I-203A).

in January 1962 so that only the 11 months preceding the sale remain in issue during the limitations period which begins February 16, 1961. (FF 76, I-278A). Judge Gurfein expressly found that "By February 16, 1961 the control of IRCA by UF had been dissipated." (Op. at 202A; FF 75 *et seq.*, I-278A). This finding was firmly supported by Sunderland's testimony, confirmed by business records, as to United's avoidance of any meddling in IRCA's internal affairs and its diligent efforts to sell its IRCA stock as required by the 1958 consent decree. (FF 76, I-278A; III-1231A, ¶VII; FF 80-82, I-279A; FF 126, I-295A). The court also found that by February 1961, the IRCA board was independent of United. (Op. at I-202-03A; FF 75-77, I-278A). During the limitations period there were no United employees or officers on the IRCA board. (FF 77, I-278A). In 1961 and thereafter United did not vote its IRCA stock or participate in the selection of nominees for the board of directors. (FF 78-81, I-278-79A). Based on a detailed analysis of each IRCA director's personal history and relationships, the court found that a majority of the board was free of any control by United. (FF 83-84, I-279-82A; Op. at I-202-03A).

Even prior to 1961 IRCA's rates and practices were not controlled by United. Thus, on the first summary judgment motion, this Court confirmed Judge Ryan's finding that there had been at least three independent directors since 1959. (Op. at I-203-04A). The trial evidence revealed that after May 27, 1959 at least seven out of the nine IRCA directors were clearly independent and not controlled by United. (FF 124, I-294-95A).* Moreover, plaintiff failed to prove that United exercised control over IRCA's directors at least from May, 1959 forward. (FF 125, I-295A). Thus, the IRCA corporate minutes in evidence from March, 1956 on do not reveal a single in-

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* In addition to the three directors found by the Court of Appeals to be independent, Haase testified that he was not controlled or dominated by United, and three additional directors were reelected to the IRCA board in the 1961 election at which United did not vote its stock or participate in the selection of nominees. (FF 124, I-294-95A). The IRCA board after January 1962 also was found independent. (FF 86, I-283A).

stance where there was a split vote regarding the adoption of any rate or practice as between directors allegedly dominated by United and others who were unquestionably independent. (FF 126(b), I-295A).*

Absent control, IRCA was free to alter any of the rates and practices complained of, and hence such rates and practices cannot be deemed to have been conspiratorially imposed in violation of law. (FF 85, 86, I-283-84A). In fact, even after United disposed of its stock in January 1962, IRCA did not change any of its rates or practices, thus confirming that they were not imposed by the exercise of any controlling stock interest. (FF 86, I-283-84A).

In view of these indisputable findings, grounded on a wealth of testimony and documentary evidence, plaintiff has failed to undermine the trial court's conclusion that United did not combine with IRCA to restrain trade through the exercise of control over it. (CL 1, I-359A; CL 8(d), I-362A; FF 75, I-278A).

Moreover, in light of the court's findings of the absence of control, all of the cases cited by plaintiff referring to control over transportation (PB 108-11), which plaintiff claims is an element of monopolization, are inapposite.

C. The Absence of Discrimination

Not only did plaintiff fail to prove any conspiratorial relationship between IRCA and United, either through contracts or the exercise of control; it also did not establish the alleged unlawful object of the conspiracy—discrimination by IRCA against United's competitors. The fact is, as the court found, that during the statute of limitations period, IRCA did not discriminate in rates or practices

* Further evidence of IRCA's independence during the late 1950's was its decision to oppose the position taken by United on the appeal in *Ripley*, and its refusal in July, 1957 to accede to a request by United that it call a special meeting of shareholders to ratify the contracts. (FF 126(c), (e), I-296A; Op. n.7 at I-247A). In addition, as early as March, 1956, McGovern, United's representative on the IRCA board until February 16, 1961, refrained from participating in discussions or voting on matters pertaining to IRCA's relations with United or Standard. (FF 126(d), I-296A; FF 77(a), I-278A).

as between United and other banana shippers. (Op. at I-213-14A; FF 38, I-267A).

Banana Line Haul Rate—Plaintiff concedes that it "is not claiming any discrimination in the rates paid on the *line haul* after February 16, 1961." (PB 94). The *Ripley* judgment required CAG to pay the public tariff for all shipments on and after January 1, 1958. (FF 115, I-291A).

Even prior to 1958, discrimination was not established in the line haul rate even though the rates differed. Thus, plaintiff failed to prove that IRCA rendered the same services to Standard (the only other competitor in Guatemala) as it did to CAG, in return for a different line haul rate. (FF 110-12, I-290A). In order to prove discrimination, it is necessary to establish not only a difference in rates, but also that the different rates were in payment for equivalent services.*

Thus, the line haul for pickup and delivery of Standard's bananas was 70 miles more each way than the comparable run for CAG. (FF 113, I-291A).** In addition, IRCA "spotted" empty banana cars at Standard's banana farms to pick up shipments while CAG had to operate its own internal railway at its own expense, and turn over its bananas to IRCA at a junction with the main line. (Op. at I-208-09A; FF 114, I-291A).†

Import Line Haul Rates—In its brief, IRCA states that it "conceded there was no discrimination on this item in

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* Harlem River Consumers Coop. v. Ass'd Grocers of Harlem, Inc., 371 F. Supp. 701, 710 (S.D.N.Y.), *aff'd per curiam*, 493 F.2d 1352 (2d Cir. 1974). *See also* Continental Baking Co. v. Old Homestead Bread Co., 476 F.2d 97, 103 (10th Cir.), *cert. denied*, 414 U.S. 975 (1973).

** A map (III-1122A) shows that Rio Bravo where IRCA picked up CAG's cars (Op. at I-209A) is near mileage marker M-300 and Tecun Uman, where Standard's plantation was located (Tr. 421), is at mileage marker M-375, a difference of about 75 miles. See also IV-A1512.

† These findings are supported by the testimony of van Diepen based upon actual visits to the Standard plantations. (IV-A1911-13). The court did not credit the testimony on which plaintiff now relies (PB 106), noting that it was "really confused." (Tr. 410-11); compare IV-A1503.

the statutory period." (PB 95). The *Ripley* judgment eliminated any claim of discrimination by providing for an increase in United's contract rate to the point where it paid the public tariff rate. (FF 119, I-292A). Even for the prior years, plaintiff did not prove discrimination in import line haul rates because it failed to offer competent evidence of the public tariff, which varied for different types of cargo, or the amounts paid by others for carriage of the same goods for the same length of haul of imports by United. (FF 117-18, I-292A).*

Use of Equipment—The court explicitly found that "IRCA did not discriminate in the allocation of banana cars." (FF 57, I-273A). Thus, the record revealed that the number of banana cars available was generally sufficient to meet all the needs of CAG, United and Standard, who were the only companies shipping bananas in Guatemala since at least as early as 1955. (FF 58, I-273A; FF 110, 111, I-290A). It was also IRCA's policy to do everything possible to move the bananas of all shippers with the least possible delay. (FF 60, I-273A). As a result of this policy, Standard never cancelled a cutting and never missed a ship. (FF 88, I-284A; Op. at I-213A). There was also no evidence that Standard ever asked IRCA to give it a greater share of the use of the CAG cars or that IRCA ever refused such a request. (FF 95, I-286A).**

Dock Charges—The court found that IRCA did not discriminate in regard to dock charges. (FF 34, I-266A). CAG loaded and unloaded its own ships on the pier at Barrios with its own labor, at its own expense. (Op. at I-206A; FF 36, I-267A). Standard, United's only competitor, used IRCA's labor for this purpose and accordingly was charged wharfage for the work performed by IRCA labor in unloading bananas at the pier in Barrios. (FF 35, I-267A; Op. at I-206A). Moreover, the IRCA board as early

* The exhibit on which plaintiff relies for proof of pre-1961 rate differences (PB 95) does not fill the gap in its proof since it does not contain the amounts paid by others for carriage of the same goods for the same length of haul of imports by United. (FF 117, I-292A).

** As to the contentions regarding the removal of 100 CAG cars from Guatemala in 1956 (PB 99-100), see FF 120-21, I-293-94A.

as 1957 adopted a resolution to advise Standard that the railroad would agree to eliminate dock charges if arrangements could be made for Standard's labor to take over the unloading. (FF 37, I-267A; Op. at I-207A). Thus, there was no difference in IRCA's treatment of the two competitors. In any event there was no competent proof that there was a cost advantage to United in performing its own unloading operations as compared with paying IRCA to do so. (Op. at I-206-07A; FF 41, I-268A).*

Practices at the Pier—The court found that IRCA did not discriminate in regard to practices on its pier, and plaintiff's claim in this regard was "sheer speculation." (FF 53, I-271A; Op. at I-212A). When United arrived in Guatemala many years before this case, and there were no other banana shippers, it placed its loading conveyors on the north side of the pier. When Standard entered the banana business in Guatemala some years later, it installed its conveyors on an apron on the south side of the pier. In order to operate without interference from cargo loading on other parts of the IRCA pier, Standard loaded on its apron where its conveyors were located and United loaded from its side of the pier where it had installed its conveyors. (Op. at I-211A; FF 54, I-272A). The only difference between the respective sides of the pier, on which plaintiff premises its allegation of discrimination, was three or four feet in the depth of the water, which the court found had no adverse effect on Standard or IRCA. (FF 90, I-284-85A; see also FF 55-56, I-272-73A; Op. at I-212A).

* As to the testimony of Haase (which plaintiff erroneously says was accepted by the court (PB 101)) the court said: "I am not going to take figures [on Standard's dock charges] from somebody's head. You will have to have better proof than that for me . . . ." (Tr. 73). PX 579 (III-1401A-02A, cited at PB 101, fn.) was properly excluded (see pp. 77-78, *infra*) and in any event would not fill the gap in plaintiff's proof since it merely refers to one isolated instance of loading which included overtime costs that may not have been typical. Plaintiff cannot obtain support from the *Ripley* court, which ordered that United and CAG "shall continue to provide, at their own cost, for the operation of the removal of bananas from the cars and their placement aboard ship" and that under these circumstances, "equity and fair dealing did not require United to pay a wharfage charge on exports of bananas." (FF 71, 73, I-277A).

Accordingly, the court's findings that there was no contract, combination or conspiracy in restraint of trade between IRCA and United are firmly supported by the trial court's in-depth analysis of the extensive evidence.

D. The Absence of Intracorporate Conspiracy

Another conspiracy that plaintiff hypothesizes is between United and its wholly-owned subsidiary CAG; but it does not specify in its argument in what manner they conspired or even what they conspired to do which restrained trade in violation of Section 1. Nor is there any proof in the record that United and CAG, operating as separate corporate entities, in fact agreed either to require IRCA to discriminate against competitive banana producers (First Claim) or to close Tiquisate for the purpose of achieving some anticompetitive effect (Third Claim).

Plaintiff simply cites *Perma-Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968), for the proposition that "the facts of common ownership could not save [defendants] from any of the obligations that the law imposes on separate entities." (PB 139-40). But in *Perma-Life,* the Supreme Court merely reversed a summary judgment for defendants and therefore did not reach the question of whether there was in fact an unlawful agreement. The quoted language plainly does not excuse plaintiff from the burden of proving facts to establish a conspiracy in restraint of trade. This vital distinction was recognized by this Court in affirming a holding that a "conclusory allegation of filial conspiracy" between a parent and its wholly-owned subsidiary, without more, was insufficient to avoid summary dismissal. *Beckman* v. *Walter Kidde & Co.,* 316 F. Supp. 1321, 1327 (E.D. N.Y. 1970), *aff'd per curiam,* 451 F.2d 593 (2d Cir. 1971), *cert. denied,* 408 U.S. 922 (1972); *Knutson* v. *The Daily Review,* 383 F. Supp. 1346, 1359 (N.D. Cal. 1974).*

* This claim is also insufficient in law under the intracorporate conspiracy doctrine. See Point VI(B), p. 64, *infra*.

Accordingly, the district court's conclusion that plaintiff failed to prove that United had entered into a contract combination or conspiracy in restraint of trade should be affirmed as not clearly erroneous.* (CL 1-3, I-359-60A).

I V

The court properly found that IRCA was not injured as a proximate result of any alleged antitrust violation by United.

Plaintiff recognizes that to recover under Section 4 of the Clayton Act, it must upset the trial court's conclusion that it failed to prove injury as a proximate result of the alleged violations by United. (PB 150). Specifically, the district court held that "It is necessary for a plaintiff to prove that the acts claimed to be in violation of the antitrust laws caused damage, in this instance, actually kept potential shippers out of Guatemala. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931); *Salerno* v. *American League,* 429 F.2d 1003, 1004 (2d Cir. 1970), *cert. denied,* 400 U.S. 1001 (1971); *Bendix Corp.* v. *Balax, Inc.*, 471 F.2d 149, 163 (7th Cir. 1972) [*cert. denied,* 414 U.S. 819 (1973)]." (Op. at I-236A). Based on extensive factual findings, the court concluded that this burden was not met. (FF 87-109, I-284-90A; FF 127-28, I-296A; FF 196, I-332A; FF 199, I-334A; FF 212-21, I-338-41A; FF 237, I-350-51A; FF 244, I-357-58A; CL 15-21, I-367-68A; Op. at I-234-37A).

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* While in the portion of its appellate brief delineating the challenged conspiracies plaintiff makes no mention of any alleged conspiracy between United and Standard (PB 138-40), plaintiff alludes to such a conspiracy elsewhere. (PB 147). It was not among the issues or plaintiff's contentions in the pre-trial order. (Amended and Supplemental Complaint I-54-86A; Pre-trial Order No. 2, Record Doc. No. 138). Accordingly, as the trial court correctly ruled, such a conspiracy was never an issue in the case. (Tr. 1049-50). Fernandez v. United Fruit Co., 200 F.2d 414 (2d Cir. 1952), *cert. denied,* 345 U.S. 935 (1953).

A. Lack of Injury Proximately Caused by Alleged Violations in the Limitations Period

The Absence of Competitors with the Intent and Capacity to Ship But For United's Acts—A principal item of damage claimed by plaintiff in its complaint is some 16 million dollars in loss of profits on the "transport of bananas competitive to United" (Amended and Suppl. Complaint, ¶39(e)(i) at I-75A; see also ¶58(d)(i) at I-81A).* These damages are alleged to result from all of the antitrust violations asserted under Sections 1 and 2 of the Sherman Act as well as Section 7 of the Clayton Act. As a prerequisite to proving a hypothetical loss of profits from competitive shipments, IRCA had to demonstrate that there were persons with the intent, preparedness and capability to grow and ship bananas in western Guatemala, and that they did not do so because of United's alleged antitrust infractions.

There is a wealth of authority supporting the logical proposition that an antitrust plaintiff claiming injury from unlawful conduct excluding it from a business or market can only prove injury under Section 4 of the Clayton Act by first establishing that it had the intent, preparedness and capacity to enter that business or market and would have done so but for the unlawful exclusionary conduct of defendant. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 126-27 (1969); *Martin* v. *Phillips Petroleum Co.*, 365 F.2d 629, 633 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 395-96 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Stearns* v. *Tinker & Rasor*, 252 F.2d 589,

* This trial only involved the issue of liability; *i.e.*, violation and injury proximately caused by the alleged violations, the so-called "fact of damage." The issue of the amount of damage was severed for later trial if liability was established. The standard of proof required to establish the fact of damage is stricter than that applied to calculate the extent of damages. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931); Dantzler v. Dictograph Products Inc., 309 F.2d 326, 330 (4th Cir. 1962), *cert. denied*, 372 U.S. 970 (1963). Significantly, most of the cases cited by plaintiff in its argument (PB 107-49) are suits by the government where there was no requirement of proving injury and proximate cause.

606 (9th Cir. 1957); *Triangle Conduit & Cable Co.* v. *National Electric Products Corp.*, 152 F.2d 398, 399 (3d Cir. 1945); *American Banana Co.* v. *United Fruit Co.*, 166 F. 261, 262 (2d Cir. 1908), *aff'd without specific reference to this issue*, 213 U.S. 347 (1909).

If potential competitors of United would have to prove an intention, preparedness and capacity to enter the banana business in western Guatemala in order to establish injury, it necessarily follows that IRCA, whose claimed injury indirectly derives from injury to these potential entr ts, must likewise establish the same elements in order to recover under Section 4.*

As the district court found, plaintiff adduced "no evidence" to prove that any competing banana producer would have entered Guatemala and shipped over the railway absent the alleged violations. (Op. at I-234-35A). Not a single competitive banana producer was deposed or called as a witness to prove its ability to begin a banana business in western Guatemala or that it intended to do so but was dissuaded by the alleged unlawful conduct of United. (*Id.*).

Plaintiff's failure of proof is placed in legal perspective by the *Zenith* case on which paradoxically it relies. (PB 150).' In *Zenith*, the plaintiff asserted that it was foreclosed from entering the English television market as a result of an antitrust violation stemming from an illegal patent pool. Justice White defined the issue as whether

> "Zenith wanted and intended to enter, had the capacity to do so, and was prevented from entering by its inability to secure a patent license and by other operations of the English patent pool. Section 4 of the Clayton Act required that Zenith show an injury to its 'business or property by reason of anything forbidden in the anti-

* The burden of a plaintiff claiming indirect damages from lost profits in its dealings with those directly injured does not usually arise in the context of proof of injury b e such claimants are denied standing to sue under the law app in this and other circuits. See Point VI(E), *infra*, at p. 67. Judge Gurfein, however, chose to deal first with the issues of causation and injury apparently because of the obvious failure of proof, and thus did not have to reach the legal question of standing. (Op. at I-237A).

trust laws.' If Zenith's failure to enter the English market was attributable to its lack of desire, its limited production capabilities, or to other factors independent of HRI's unlawful conduct, Zenith would not have met its burden under § 4." (395 U.S. at 126-27) (footnote omitted).

The Supreme Court then ruled that "The Court of Appeals correctly rejected the inference that 'Zenith intended to and was prepared to enter the English television market during the damage period.' " (*Id.* at 128). Although it recognized that Zenith "was interested in the English market" and that it "had the facilities and the ability" to enter, the Court nevertheless held that was insufficient because Zenith did not prove overt acts demonstrating that it pursued the development of a product to be sold in that market. (*Id.* at 127).*

In light of its total failure of proof on this vital issue, plaintiff is reduced to the argument, citing *Zenith* (*Id.* at 120), that United's alleged violations "necessarily" had an impact on it. (PB 157). But this reference in *Zenith* concerned the effect of the illegal patent pool on Zenith in the Canadian market, *after* the plaintiff had proven its intent, preparedness and capacity to enter, did in fact enter and was repulsed. (*Id.* at 118). Plaintiff's error in interpreting *Zenith* to hold that proof of violation that is sufficiently serious obviates proof of the fact of damage is further demonstrated by the Supreme Court's rejection of

* The necessity for an overt act also was emphasized by the Sixth Circuit Court of Appeals in affirming the rejection of a claim for lost sales due to exclusion from a business in violation of the antitrust law:

> "There was only a stated intention to enter this additional production with no overt act performed in connection therewith and no expectation of money to provide the required facilities. Preparedness and capacity to engage in a business means more than an intention to do so and an ability to buy the necessary facilities." (Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395-96 (6th Cir. 1962), *cert. denied,* 372 U.S. 907 (1963), cited approvingly in *Zenith* at 395 U.S. at 127 n.21).

Accord, Stearns v. Tinker & Rasor, *supra,* 252 F.2d at 606; N.W. Controls, Inc. v. Outboard Marine Corp., 333 F. Supp. 493, 506-07 (D. Del. 1971).

injury claims in the English market, even though the same unlawful patent pool existed there as in the Canadian market:

> "[T]he question at hand is not whether, if Zenith had decided to enter the market, the pool would have been a deterrent and inflicted damage. Rather, it is whether Zenith was in fact constrained by the pool to stay out of England during the damage period or whether Zenith's own business calculus led it to await more favorable conditions." (*Id.* at 128).

Here the evidence shows that it was the "business calculus" of the allegedly excluded competitors—not IRCA rates or practices allegedly required by United or United's conduct in closing Tiquisate—which led others to refrain from growing bananas in western Guatemala and shipping on the railroad. (FF 87, I-284A; FF 107-09, I-289-90A; FF 218-20, I-339-41A; FF 229, I-343-45A; Op. at I-225A, 234-35A).

Finally, IRCA argues that it was required by the court to prove who its customers would be whereas Zenith was not. (PB 160). However, IRCA, which was not itself a potential banana grower, is claiming damage derivatively as a result of the exclusion of its customers. (Op. at I-235A). In contrast, Zenith was directly excluded and therefore had to prove its own intent and capability rather than that of its customers.

Having demonstrated plaintiff's failure to adduce evidence essential to meet the basic legal standard for proving injury from hypothetical lost shipments, we now analyze this and additional omissions in plaintiff's proof on each claim.

First Claim—Lack of injury from alleged discriminatory rates and practices. Apart from plaintiff's failure to prove discrimination or that its rates and practices were dictated by United, there was no proof of injury caused by IRCA's rates and practices. IRCA's own former president, Haase, who was its chief witness at trial, conceded that IRCA did not lose any revenue as a result of the complained of rates and practices. (FF 89, I-284A; IV-A1593, A1622). As Haase admitted, Standard, the only other shipper (FF 110, I-290A; Op. at I-208A) never cancelled a cutting and

never missed a ship because of any preference in the allocation of banana cars. (FF 88, I-284A; Op. at I-212-13A). Nor did Standard ever ask the railroad for more cars. (FF 88, I-284A; FF 94-96, I-286A; IV-A1593-96; IV-A1621-22). As to the pier, there was no evidence that Standard had the intent or capacity to bring in larger ships if it could have used United's side of the pier or that it ever even asked to use United's area. (FF 90, I-284-85A; Op. at I-212A).

The requirement of demonstrating intent, preparedness and capacity is equally applicable to plaintiff's claim that Standard would have expanded its operations if not for the railroad's rates and practices. (PB 143). Thus, in *Martin* v. *Phillips Petroleum Co., supra,* the Court of Appeals held:

> "Here we deal with the contention that a business expansion was envisioned, and we hold that the same rule applies. There must be a showing of intent to expand and of preparedness for the expansion." (365 F.2d at 633).*

Here again, IRCA offered no witness to prove that Standard had the finances, laborers or other capability or the interest to have expanded in the same area it ultimately decided to leave because of blowdowns. (FF 91-94, I-285-86A; Op. at I-206-07A, 234-35A). Whether or not Standard expanded elsewhere is not probative of its intentions in Guatemala.** In this respect, plaintiff did not even prove the comparability of the other areas for banana cultivation (FF 98, I-287A), and United demonstrated the inherent disadvantages of western Guatemala compared to other countries where it and Standard were both expanding. (FF 107, I-289A; FF 151-62, I-307-18A; FF 229(a), I-344A; Op. at I-225A, 234-35A). In contrast

* As we have shown, the Supreme Court applied the same analysis to Zenith's claim that it was foreclosed from expansion in the Canadian market. 395 U.S. at 118-25. *Accord,* Denver Petroleum Corp. v. Shell Oil Co., 306 F. Supp. 289, 308 (D. Colo. 1969).

** The court found that "plaintiff has not shown that [Standard] expanded significantly in other locations *rather than in Guatemala.*" (FF 97, I-287A (emphasis added)).

to the total absence of any Standard Fruit witnesses or documents, plaintiff in *Zenith* presented the testimony of its officers as "to the similarities between the Canadian and American markets" and the lower courts accepted their sworn statement that but for the illegal patent pool they would have done as well in Canada. (395 U.S. at 122).

Plaintiff also failed to prove the intent, preparedness and capacity of any other shipper to enter western Guatemala absent its rates and practices. (FF 99, 100, 128, I-287A, 296A). It has only listed some firms who purchased bananas in Ecuador (PB 145-46), who may well have lacked the financial capacity to undertake the development of their own plantations (FF 100-02, I-287-88A; Op., n. 12 at I-249A), or the willingness to risk their capital in an area subject to windstorms and other natural hazards. (*Id.*).* In similar circumstances, the mere existence of companies operating in other tropical countries was held by this Court to be insufficient to prove the requisite intent, preparedness and capacity needed to establish injury. In *American Banana Co.* v. *United Fruit Co.*, *supra* (cited approvingly by the Supreme Court in *Zenith*, 395 U.S. at 127 n. 21), plaintiff, the owner of a banana plantation in Costa Rica, claimed that defendant's monopolistic practices prevented it from buying elsewhere. In holding that the complaint failed to state a cause of action, this Court said:

> "In the present case . . . it is not alleged that the plaintiff had made any preparations to engage in the business of buying bananas independently of the operation of its own plantation, nor that it desired or intended to engage therein as a separate and independent business. It is not averred that the plaintiff invested any money in preparing to engage in any such independent business; nor does the extent to which, nor even the country in which, it desired or intended to engage therein, appear." (166 F. at 264).

The same deficiencies exist in IRCA's proof.

* Ecuador, unlike Guatemala, encouraged and aided banana production. (FF 108-09, I-289-90A; FF 220, I-340-41A). For these and other reasons, local farmers in western Guatemala did not cultivate bananas to be sold to importers. (FF 103, 104, 107, I-288-89A).

Even if injury from IRCA's rates and practices had been proven, the proximate cause would have been IRCA's own inaction, not United's conduct. Thus, the railway plainly was free during the late 1950's to alter any of the complained of rates and practices. (FF 85-86, I-283-84A; FF 122-26, I-294-96A; Op. at I-207A). However, it failed to do so. Even after February, 1961, when the IRCA board was unquestionably independent, and after January, 1962 when United no longer owned a controlling interest in IRCA, IRCA nevertheless did not change any of the complained of rates and practices. (Op. at I-202-03A; FF 75-77, I-278A; FF 83-86, I-279-84A). Thus, for example IRCA could have eliminated the dock charges to Standard about which it now complains. However, in March, 1961 its independent board of directors, without any exercise of influence by United, did not take any action when Standard requested a change in arrangements at the pier. (FF 86, I-283-84A; Op. at I-207A).* Similarly, IRCA could have made different arrangements for operations on various locations on the pier or for allocation of equipment about which plaintiff now complains, but it did not do so. (*Id.*). Practices voluntarily pursued by plaintiff cannot give rise to a valid claim of injury. *Royster Drive-in Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F.2d 246, 249 (2d Cir.), *cert. denied*, 361 U.S. 885 (1959).

Third Claim—Lack of injury from United's plan to close Tiquisate and allegedly preclude competitors from acquiring the land. Plaintiff did not prove that there was any prospective purchaser who had the intent, preparedness and capacity to buy the Tiquisate land for banana cultivation or that United prevented such a purchaser from acquiring the land. (FF 213, 214, I-338A). Here again, other reasons for not entering the banana business in Guatemala were demonstrated by the evidence. For example, land purchasers preferred to grow cotton in which there was an economic boom. Cotton was not subject to the wind-

* Plaintiff speculates that IRCA's directors "remembered" that United voted its stock in 1958. (PB 103). No directors testified to such a state of mind, and nothing prevented them from taking action on Standard's request some two months later after the election when United had in fact refrained from voting its stock. (FF 81, I-279A; FF 86, I-283-84A).

storms and other natural hazards that made Tiquisate undesirable for bananas, and the Guatemalan government accordingly encouraged development of the cotton industry and discouraged banana production. (FF 218-20, I-339-41A; see Statement of Facts, p. 9, *supra*).

No potential competitor made an offer to buy land in Tiquisate or engaged in any overt act of the kind held necessary to evidence intent, preparedness and capability. (FF 219, I-340A). Prospective purchasers were not interested in buying land at Tiquisate for banana growth because that product, as United had learned through bitter experience, could not be grown profitably there; because other areas had better soil and fewer windstorms; and because at least some of the prospective buyers lacked the financial capability. (FF 107, I-289A; FF 151-62, I-307-18A; FF 218-20, I-339-41A; FF 227-29, I-343-45A; Op. at I-225A).* Irrespective of United's actions, there was plenty of land available in western Guatemala for banana growing including Standard's former plantations, which without any interference by United, no one chose to buy for banana cultivation. (FF 219-20, I-340-41A; FF 244, I-357-58A).

Finally, Mr. Chalk was found, based on the memoranda of the talks with him and confirmed by testimony, to lack the requisite intent and preparedness as evidenced by his unreasonable demands, his failure to make a firm offer to buy, and his admitted lack of resources. (FF 232-33, I-346-47A; FF 237-40, I-350-53A; FF 244, I-357-58A; Op. at I-225-27A). Plaintiff failed to prove that Chalk had the ability to finance the establishment of a banana production company at Tiquisate; to the contrary, Chalk admitted his lack of financial capability. (FF 233, I-346-47A; Op. at I-226A). Plaintiff also failed to prove that Chalk took timely and substantial affirmative action to acquire Tiquisate. (FF 234, I-347-49A).

In its attempt to demonstrate the adverse effect of the alleged foreclosure of competition, plaintiff also relies on evidence of the percentage of western Guatemalan bananas

* In *Zenith*, for example, the Court found that additional barriers such as high tariffs and costs, rather than defendant's illegal pool, kept Zenith out of Australia and therefore injury was not proven as to that market. (395 U.S. at 129).

shipped to the United States in 1960 compared with the absence of any such shipments after United left in 1964. (PB 50-51). At the time United left western Guatemala there were no banana growers there (Standard having left in 1961 due to a hurricane) so that the shipments from that area necessarily dropped to zero. This fact does not in itself prove that competitors were foreclosed from coming in by acts of United.*

The Absence of Proof of Lost Profits from Alleged Competitors' Shipments (all claims)—Plaintiff also failed to prove another vital element of its injury claim, *i.e.*, the "loss of profit attributable to patronage withheld by the particular customer" as a result of the allegedly illegal conduct. *Bendix Corp.* v. *Balax, Inc.*, 471 F.2d 149, 163 (7th Cir. 1972), *cert. denied*, 414 U.S. 819 (1973). Indeed, plaintiff did not even prove that it would have earned a profit (as distinguished from revenues) on the shipments of some other banana producer. (CL 18, I-367A). That omission is particularly significant since other evidence makes it likely that such business would have been a losing proposition. Thus, due to labor and political problems, IRCA was suffering losses in 1958 when both United's and Standard's shipments were near their peak (Op. at I-238-40A; III-925A; FF 202, I-335A; II-806A), and the railroad may well have had similar losses on other shippers' business if they had entered the area.

The Absence of Proof of Lost Profits from United's Cessation of Shipments (Third Claim)—Realizing that it has not proven lost profits due to absence of revenues from hypothetical shipments of nonexistent excluded competitors, plaintiff argues that it suffered losses from United's withdrawal of its own shipments when it left Tiquisate in 1964. (PB 151). But even if such losses were proven, they could not conceivably be an injury that resulted from an antitrust violation which by definition must restrain or exclude competition. Indeed, plaintiff itself repeatedly con-

* Plaintiff borrows this inapplicable approach from *Zenith*. In that case, however, plaintiff first proved its intent and capability to enter the Canadian market and its exclusion by the patent pool. Only then did the Court allow damages to be computed by a comparison with plaintiff's penetration in the domestic market. (395 U.S. at 118, 123-25).

cedes in its legal discussion of the alleged violation that "a critical element . . . was to foreclose competitors from [entering the banana business in] Tiquisate." (PB 125; see also PB 122, 124). Without the alleged foreclosure of competitors, there simply is no claim of antitrust violation or "antitrust" damage.* Hence the claim of injury from the closing of Tiquisate as such is not one that can be related proximately or otherwise to any anticompetitive conduct condemned by the antitrust laws. Accordingly, Judge Gurfein concluded that it was not strictly necessary to decide plaintiff's additional damage claims in view of his holding that plaintiff did not prove "that the acts claimed to be in violation of the antitrust laws caused damage, in this instance, actually kept potential shippers out of Guatemala." (Op. at I-235-36A, 238A).

Nevertheless, the court proceeded to find that plaintiff failed to prove this injury claim as well. (Op. at I-238-40A). The law is clear that the mere coincidence in time between a plaintiff's loss of revenue and a defendant's wrongful conduct is insufficient to establish injury without proof of a causal connection. *McCleneghan* v. *Union Stock Yards*, 349 F.2d 53, 56 (8th Cir. 1965); *E. V. Prentice Machinery Co.* v. *Associated Plywood Mills*, 252 F.2d 473, 477-79 (9th Cir.), *cert. denied*, 356 U.S. 951 (1958); *see also Royster Drive-in Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F.2d 246, 250 (2d Cir.), *cert. denied*, 361 U.S. 885 (1959). Moreover, the court found that the railroad's downfall was attributable to causes other than United's withdrawal in 1964, and was particularly the result of nationalistic actions by the Guatemalan government combined with serious labor difficulties. (Op. at I-238-40A).

The railroad's downfall began in the 1950's after a Communist takeover of Guatemala at a time when United was shipping large amounts. (Op. at I-238-40A; III-925A). The court found that following the takeover, IRCA (an American corporation) became the target of nationalistic attacks. It suffered losses of business resulting from "dis-

* See GAF Corp. v. Circle Floor Co., 463 F.2d 752, 758-59 (2d Cir. 1972), *cert. dismissed,* 413 U.S. 901 (1973), Point VI(E), p. 71, *infra.*

astrous" truck competition on the government's newly constructed highways paralleling the railroad tracks and terminating at a newly built government port to which IRCA was denied access. (*Id.*). Government decrees were passed requiring goods to be shipped through the government port. (*Id.*). These nationalistic actions were accompanied by serious labor difficulties which began as early as 1958 and continued throughout subsequent years. All of these debilitating factors were proven by documents from IRCA's own files and the testimony of its former executives, on cross-examination. (*E.g.*, III-953-54A, 977-81A, 986A, 1020A, 1070A, 1106-08A, 1165A, 1185A, 1187A, 1301-02A, 1322A; IV-A1529-63, A1634-47).*

The sole reed on which IRCA relies in seeking reversal of these extensive findings is a single document (PX 152 (II-458-66A)) purporting to show that the elimination of United's shipments would increase its already substantial losses. (PB 152). The author of this analysis was not called as a witness to explain it. The document estimated costs for 1960—four years before IRCA in fact lost United's shipments from Tiquisate.** The report was also accompanied by an opinion of IRCA's accountants, the firm of Peat, Marwick, Mitchell & Co., which specifically warned that the results would be affected "substantially" by changes in composition of traffic movement as well as changes in total volume, such as occurred from 1960 to 1964. (PX 219 (II-474A); III-925A). In addition, Peat, Marwick commented that the analysis was "based on broad concepts which may in many circumstances be faulty in actual application." (II-474A). In view of the numerous defects in plaintiff's sole piece of evidence on this issue, the district court can-

* United and CAG never "acknowledged" that future banana shipments from CAG were "vital to the survival of IRCA" (PB 15, 154). Plaintiff cites a letter (II-378A) in which a CAG local manager stated to another United employee that Haase, the President of IRCA, had made such an assertion. In any event, the statement was made in 1960 and is thus not probative of the actual effect of CAG's closing in 1964.

** The analysis in PX 152 also is inapplicable to the effects of the closing of Tiquisate because its conclusions were premised on the cessation of *all* United shipments in Guatemala, whereas United continued to ship over IRCA after 1964 from its Bananera plantation in eastern Guatemala. (FF 163, I-318A; FF 224, I-342A).

not be faulted for rejecting plaintiff's findings based upon it.

Finally, the court found that plaintiff failed to prove that United's conduct led to the Guatemalan government's foreclosure on a loan to IRCA which enabled the government to take over the railway. The loan was made in 1968 during a strike of railway employees under conditions which rendered IRCA unable to repay. Viewed against the history of political and labor problems in Guatemala, these injurious events—which occurred some four years after United's closing of Tiquisate—were properly found to be attributable to factors other than any alleged illegal conduct of United. (Op. at I-238-40A; II-477-91A; III-1206-08A; IV-A1638-47; Tr. 527-29, 552, 567-68).

B. Lack of Injury Proximately Caused by Alleged Violations Prior to the Limitations Period

This Court in 1967 affirmed a partial summary judgment in this case in which "the District Court properly held that all claims under the antitrust laws arising prior to February 16, 1961, were barred by limitations." *International Railways of Central America* v. *United Fruit Co.*, 373 F.2d 408, 416-17 (2d Cir.) (I-13-14A), *cert. denied*, 387 U.S. 921 (1967).* Plaintiff now seeks to resurrect its claim for damages resulting from acts occurring prior to February 16, 1961, which the statute of limitations would normally bar, by attempting to bring its case within the narrow exception carved out in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971). *Zenith* held that a plaintiff may recover damages incurred during the statutory period resulting from earlier illegal conduct if—and only if—those damages would have been too speculative to permit recovery "within four years of the conduct from which they flowed" but became provable with sufficient certainty during the limitations period. (401 U.S. at 339-40).

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* This action against United was filed on February 16, 1965. The applicable statute of limitations provides that any action to enforce a claim under the antitrust laws "shall be forever barred unless commenced within four years after the cause of action accrued." § 4B, Clayton Act, 15 U.S.C. § 15b.

In its brief, plaintiff recognizes that before reaching the question posed in *Zenith*, it must establish a causal nexus between the pre-statute of limitations conduct alleged to be unlawful and the injury claimed to have been incurred during the statutory period. (PB 156). The district court found that here the causative link was not proved and therefore there was no necessity to determine whether plaintiff met its additional burden of satisfying the two conditions prescribed by the *Zenith* rule. (Op. at I-237A; CL 20-21, I-368A). Here again plaintiff makes no showing that this dispositive finding was clearly erroneous.

Third Claim—Lack of Injury—Plaintiff first suggests that an alleged reduction in United's shipments prior to 1961 was somehow related to the violation alleged to result from the closing of Tiquisate in 1964. (PB 155). Since the closing occurred more than three years after the critical date of February 16, 1961—and not before—the *Zenith* rule clearly has no relevance to any claim based on that act. As to the alleged reduction of shipments prior to 1961, the court found that during the transitional period, while the Valery banana was under development, United continued to operate the Tiquisate division and explored means of improving its performance. (FF 200-01, I-344A; CL 14, I-366A; see FF 185-87, I-327-28A). Indeed, substantial shipments were made throughout the pre-limitations period. (FF 202, I-335A). In 1960 more carloads were shipped by United than in any year in the previous ten-year period. (*Id.*). Reductions in shipments thereafter were caused by agronomic circumstances beyond United's control, particularly Panama disease and windstorms. (FF 176, I-324A; FF 183-84, I-326-27A; FF 204, I-335-36A). No antitrust illegality or injury was established in respect of any pre-1961 reduction of shipments.

First Claim—Lack of Injury—The only pre-1961 antitrust violations claimed by plaintiff relate to alleged acts of discrimination by IRCA which purportedly were required by United pursuant to contracts and the exercise of control over the railroad. (PB 156-57, referring to PB 93-106).* Plaintiff claims that these alleged violations were a

* There also was no proof of discrimination either before or after 1961. (See Point III(C), p. 35, *supra*.)

substantial contributing cause of Standard's abandonment of its plantations in 1961, which in turn caused the railroad to lose revenues. (PB 161-62). However, as we have noted, the district court found that "so far as the unrefuted evidence shows," Standard left Guatemala "only because a 'blow-down' destroyed its plantations in 1961." (Op. at I-234A; see Op. at I-207A; FF 87, 91, I-284-85A). Plaintiff argues that Standard would have expanded its production capacity in western Guatemala prior to 1961 but for the alleged violations and therefore would have been better able to withstand the hurricane damage. (PB 162). This contention was not established in accord with the applicable law, previously reviewed, which requires proof of intent, preparedness and capacity to expand absent the violations. Moreover, since neither witnesses nor records of Standard were offered to prove its intent or capacity to expand, this argument must be rejected in relation to the pre-1961, as well as the post-1961 claim. As the district court held, evidence rather than a mere theory is required to establish this claim. (Op. at I-235A).

Plaintiff also suggests that since United did not decide to leave Guatemala as a result of the 1961 hurricane, Standard would not have done so either if not for alleged violations. (PB 162). This speculation ignores the documentary evidence from IRCA's own files, as well as the testimony of its president, Haase, that the hurricane hit Standard's plantations first and then proceeded to Tiquisate. Standard's acreage was "completely destroyed by the November 1 hurricane," whereas only "about half" of the CAG farms were damaged. (FF 87, I-284A; IV-A1520-21; III-1065-66A). Moreover, the 1961 hurricane was indicative of western Guatemala's record of bad windstorms which was a key factor in United's decision to abandon that area several years later. (FF 157, I-312-13A; Op. at I-216A).

Plaintiff then asserts that the same "rationale" which it advanced to prove indirect injury through Standard, "applies to independents other than Standard." (PB 162). Such other independents, however, were nonexistent. As the trial court found, "The plaintiff has not shown that there ever was a single other potential competitor who

indicated an interest in Guatemalan banana growing to the point of approaching IRCA to see what arrangements for shipping could be made." (Op. at I-234-35A; FF 127, 128, I-296A). The court found that in the period December 31, 1955-February 15, 1961, there were virtually no banana growers in Guatemala other than Standard, CAG and United. (FF 127, I-296A; PX 1396 (II-806A-807A)). The court also found that plaintiff did not prove the existence of other banana producers with the intent, preparedness and capacity to ship via IRCA during this period absent the complained of rates and practices. (FF 128, I-296A).

Accordingly, IRCA's claim of injury from pre-1961 conduct is just as speculative after the limitations period as it was before, and must be rejected for lack of proof of proximate causation and injury without even reaching the *Zenith* rule.

Lack of a Causal Nexus Between Alleged Pre-Limitations Violations and Alleged Post-Limitations Injury—The causal nexus between any unlawful conduct claimed in the pre-limitations period and any alleged injury occurring after 1961 is also broken by the termination of the complained of acts and practices at least as early as 1958. The district court concluded that, unlike *Zenith* where the Supreme Court found a continuing conspiracy, here "the alleged conspiracy . . . had become a matter of history by the time the statutory period began." (Op. at I-233-34A).* The critical events terminating the complained of

* In contrast, the Supreme Court in *Zenith* found that defendant was engaged in a continuing conspiracy before and after the limitations period and the issue was whether Zenith could recover all of the damages it suffered during the limitations period "even though some undetermined portion of those damages was the proximate result of conduct occurring more than four years prior to the filing of the counterclaim." (401 U.S. at 333). Thus, in *Zenith* the defendant sought to impose on the Court the difficult task of taking a sum of damages which was proven to have been caused by a continuing conspiracy, and attempting to eliminate that amount alleged to be attributable to the pre-limitations portion of that violation. Unlike *Zenith*, the allegedly unlawful conduct of United was affirmatively found to have ceased at least as early as 1958, and no injury was found to have been caused by any violations either before or after the limitations period.

acts (which were not found to be unlawful) were the government's consent decree entered on February 4, 1958 and the *Ripley* judgment entered on December 19, 1957.* (Op. at I-202-04A, 232A; FF 62, I-274A; CL 8-10, I-361-62A; FF 10, I-257A; FF 70-74, I-277A; CL 10, I-362A). See Point III, *supra* at p. 32. The court also found that Sunderland, who took office in 1959, took affirmative steps to assure that United complied both with the consent decree and the antitrust laws, and that he avoided any attempt to interfere in IRCA's management. (CL 12-13, I-363-64A; Op. at I-203A; FF 82, I-279A; FF 126, I-295-96A).** The trial court's findings reviewed *supra* at pp. 32-38, concerning the absence of discrimination by IRCA, and the lack of any contractual or other requirement by United that IRCA discriminate during a substantial period prior to 1961, further support the court's conclusion that there was no causal nexus beween the complained of acts and practices prior to 1961 and any claimed injury thereafter. (Op. at I-236-37A).

In sum, since plaintiff has not proven injury during the limitations period proximately caused by earlier violations, the district court correctly decided that there was no occasion to reach the issue of applying the *Zenith* rule. It is plain that IRCA's proof of injury is no less speculative after the limitations period than it was before. The court's findings as to the absence of proof of the essential element of injury in the limitations period proximately caused by allegedly illegal acts committed at any time are not clearly erroneous and support the dismissal of all claims.

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* The antitrust violations are alleged to have begun as early as 1928 but the court found that overt acts as long as 33 years before the limitations period could not have proximately caused damages after 1961 and hence it drew the line at 1955. (Rulings on Collateral Estoppel, fn. 8 at I-111A; FF 19, I-260-62A; Suppl. Mem. Op. at I-120A). The district court's findings of events breaking any causal nexus, which are reviewed above, refer to the period between 1955 and 1961.

** Plaintiff had the burden of proving a continuing violation as well as injury therefrom. Royster Drive-in Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., 268 F.2d 246, 249 (2d Cir.), *cert. denied*, 361 U.S. 885 (1959).

V

The Section 7, Clayton Act claim was properly dismissed based on findings that (1) United did not use its stock ownership to exercise control over IRCA; (2) IRCA did not discriminate as a consequence of alleged control; and (3) IRCA was not injured thereby.

The Sixth Claim of the complaint alleges a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, resulting from United's utilization during 1961 of stock ownership in IRCA, originally acquired in 1928 and 1936, in order to substantially lessen competition in the importation of bananas into the United States. (FF 24, I-264A). The claim was limited to the eleven months between the start of the statute of limitations period on February 16, 1961 (I-13-14A) and the sale of United's stock in IRCA in January 1962. (FF 76, I-278A).*

The claim, as alleged in the Amended and Supplemental Complaint (I-84-85A), parallels that of the First Claim under the Sherman Act (discussed in Point III, *supra*). Thus, the claim simply realleges the allegations of earlier paragraphs in the First Claim describing United's acquisition of IRCA stock in 1928 and 1936 (¶79 at I-85A, ¶¶18, 20 at I-62A) and charging that United exercised control over the railroad until the sale of the stock in January 1962. (¶79 at I-85A, ¶¶23, 24 at I-63A). The Sixth Claim also realleges the charge in the First Claim that the "effects" of United's alleged exercise of control were to require IRCA to engage in alleged discriminatory rates and practices which suppressed competitive banana traffic over IRCA. (¶81 at I-85A). Precisely the same injury to IRCA from this conduct is asserted as in the Sherman Act claims, the pertinent paragraphs of which are simply realleged. (¶83 at I-85A; FF 24, I-264A). Accordingly, the very same reasons that required dismissal of the claim of injury from the acts alleged to violate the Sherman Act, to wit, the non-exercise

* United sold all but 100 shares of its approximately 39% interest on January 25, 1962. (FF 76, I-278A; III-1074-77A; III-1335A, 1338A).

of control, the absence of discrimination and the lack of injury during the limitations period, similarly support the dismissal of plaintiff's claim of injury by reason of the very same acts alleged to violate Section 7. (See Points III, IV, *supra*). The lesser standard of violation under Section 7, *i.e.*, probable rather than an actual suppression of competition, does not help to fill the gaps in plaintiff's proof on the issues of proximate cause and injury.*

A parallel analysis supporting dismissal of a private Section 7 claim was affirmed by this Court in *Gottesman* v. *General Motors Corp.*, 310 F. Supp. 1257 (S.D.N.Y. 1970), *aff'd*, 436 F.2d 1205 (2d Cir.), *cert. denied*, 403 U.S. 911 (1971). That case involved a derivative action by stockholders of General Motors claiming that duPont utilized its stock ownership in General Motors and required it to purchase automotive fabrics and finishes from duPont; that this suppressed competition in the sale of such products to General Motors; and that General Motors was injured by reason of having to pay higher prices. DuPont's continued ownership of General Motors stock had been held unlawful under Section 7 in a government action.**

In holding that a private cause of action could be brought under Section 7, this Court said:

> "Of course, plaintiffs cannot rest on a showing of a violation of Section 7; they must, as in private actions under other sections of the antitrust laws, prove that they have been injured by the violation." (*Gottesman* v. *General Motors Corp.*, 414 F.2d 956, 961 (2d Cir. 1969)).

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* If this were a government suit for injunctive relief, the case would likewise fail since in that event, "[T]he test of a violation of § 7 is whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints." United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 607 (1957). As the district court noted, United's stock in IRCA had been sold three years before suit and there was no possibility of a tendency to limit competition at the time of suit. (Op. at I-230A).

** In the instant case, there is no finding that United violated Section 7.

"[P]laintiffs have the burden of showing not only antitrust law violation but injury as well." (*Id.* at 965).

On remand, Judge Metzner framed the issues as follows:

"First, did duPont's stock ownership produce the sales to General Motors? Second, if so, could General Motors have bought the merchandise at lower prices with equal quality and services?" (310 F. Supp. at 1259).

Although duPont was found to have "the power to control" General Motors by reason of its stock interest, the district court, focusing on the "facts during the damage period in issue," found that "the plaintiffs have failed to prove by a preponderance of the evidence that the stock interest caused General Motors to purchase its automotive finishes and fabrics from duPont"; and that "plaintiffs have failed to prove injury." (*Id.* at 1259-60).

The Court of Appeals reviewed the district court's findings including the fact that General Motors' "business judgment was not affected directly or indirectly by duPont's stock ownership"; "no evidence was adduced that any competitive source was foreclosed from obtaining finish business from General Motors"; and "there is no evidence that duPont, directly or indirectly, influenced the decisions made" in General Motors' purchasing practices. (436 F. 2d at 1211). The Second Circuit held that the district court's findings were not erroneous under the standards of Rule 52(a) and affirmed.

In the instant case, Judge Gurfein found that plaintiff failed to prove that in the damage period (and earlier as well), United's stock ownership caused IRCA to engage in any discriminatory practices. (Point III, *supra* at pp. 33-35). Thus, the district court found that plaintiff "failed to prove that United exercised control over IRCA's directors during this period [1959] or thereafter." (FF 124, 125, I-294-95A). Moreover, the district court found that by February 16, 1961, any control over IRCA by United had been dissipated, irrespective of its continued ownership of IRCA

stock (which United was making diligent efforts to sell, FF 76, I-278A); and by this date, "the IRCA board was independent." (Op. at I-202-03A).

Following the parallel reasoning in *Gottesman,* these findings bar recovery under the Sixth Claim since plaintiff has not proven a causal connection between United's ownership of IRCA stock and the first step in the claim of alleged injury, which in this case was United's allegedly having exercised control over IRCA to require it to engage in discriminatory acts and practices during the limitations period.

We have already demonstrated in detail that the second link in the causal nexus between stock ownership and the alleged injury was also not proven. IRCA was not shown to have discriminated against United's competitors in the limitations period (Point III, pp. 35-38, *supra*). As to the next link in the causative chain, again paralleling the analysis in *Gottesman,* there was no proof that competitive banana producers were foreclosed by United from providing business to IRCA (Point IV, pp. 44-49, 53-55, *supra*); and no proof that IRCA would have or did in fact alter its rates and practices in the absence of United's stock ownership. (See pp. 35, 47, *supra*).

Finally, the district court's definitive finding that "IRCA did not lose any revenue as a result of the complained of rates and practices" (FF 89, I-284A) also precludes any recovery from the charge that such rates and practices were caused by United's stock ownership. Since precisely the same injury is claimed as in the other claims, the entire discussion in Point IV, *supra,* is applicable to require dismissal of the Sixth Claim as well.

Plaintiff's argument boils down to the point that "the District Court vitiated the normal four year statute of limitations," suggesting that United's mere holding of IRCA stock during the recovery period is sufficient. (PB 149).* But as this Court held in *Gottesman,* mere owner-

* We need not deal with the question of whether United's technical ownership of IRCA stock for eleven months in the limitations period was a violation, although in view of United's diligent efforts to divest the stock (FF 76, I-278A; CL 8(b), I-362A) and non-exercise of control (FF 75, I-278A; FF 124-25, I-294-95A; CL 8(d), I-362A), it is unlikely that there was even a probable anticompetitive effect in that period.

ship of stock is insufficient to sustain a private claim under Section 7; plaintiff also must prove that the stock ownership was used to cause the acquired company to take certain actions which foreclosed competition and caused it injury. Since the district court's findings on plaintiff's failure to meet its burdens on these key elements of its claim are well supported and not clearly erroneous, the dismissal of the Sixth Claim was proper.*

VI

Plaintiff has failed to establish various other essential elements of its antitrust claims.

In view of the findings that United had no monopolistic intent, that there was no conspiracy in restraint of trade and that plaintiff has failed to prove injury as a proximate result of the alleged violations, the district court deemed it unnecessary to reach various legal questions that would have to be resolved in plaintiff's favor in order for it to sustain its claims. Nevertheless, plaintiff devotes much of its brief to arguing that it has fulfilled its burdens in establishing these other legal elements. As we will demonstrate, the facts found by the court, when analyzed in light of the applicable case law, reveal that plaintiff has not carried its burden on the remaining essential elements of its claims.

A. Plaintiff Has Not Proven that United Possessed Monopoly Power in the Relevant Market.

Throughout its brief, plaintiff refers to "United the monopolist" (*e.g.,* PB 1, 107, 116) as if the court had made such a finding. The fact is, however, that in view of the court's finding that United lacked the intent to monopolize and did not engage in any monopolistic practices, the court left to one side the issue of whether plaintiff established

* Plaintiff also lacks standing to claim injury resulting from an alleged Section 7 violation. (See Point VI(E), *infra* at p. 69).

the other essential element to the offense of monopolization, *i.e.,* whether United possessed monopoly power (the power to control prices or exclude competition) in a properly defined relevant market. (Op. n.13 at I-250A; see pp. 17-18, *supra*). Since plaintiff argues the point (PB 134), we respond briefly.

The pertinent portion of Section 2 interdicts monopolization "of any part of the trade or commerce . . . with foreign nations." The touchstone of the issue of the relevant market must therefore be the importation of bananas into the United States. From this point of view, bananas imported from all geographic areas, the area defined by the court as "the American tropics" (Central and South America and the Caribbean) (FF 27, I-265A; FF 4, I-254A), effectively compete with each other.* Thus, plaintiff concedes that bananas imported from Ecuador competed with bananas imported by United from other places (PB 42, 55), a fact also found by the court. (FF 132, I-298-300A; FF 139, I-302-03A; see also IV-A1852-53, A1921-26; III-1021A, 1288-89A).** Since the purchaser in the United States "can practicably turn for supplies" to numerous areas in addition to Guatemala, there is no basis for plaintiff's claim that western Guatemala is a separate

* The document on which plaintiff relies to show differences in costs of transportation reveals on its face that the cost of transportation from Honduras was precisely the same as from Guatemala. (II-903A, cited at PB 53-54). In addition, the court found that other areas had cost and quality advantages over Tiquisate so that bananas from all areas competed. (See pp. 8-9, 14, 19, *supra;* FF 151-59, I-307-16A; FF 172, I-323A).

** This fact undermines plaintiff's arguments that Guatemala and Central America constitute separate relevant markets. (PB 49, 53-54). Moreover, the western division of the United States, also mentioned by plaintiff (PB 63-65), is irrelevant to this case because Tiquisate bananas could not economically be shipped to the western division of the U.S. since as plaintiff concedes, it was impractical to build a port on the western coast of Guatemala. (PB 17; FF 182, I-326A; see also FF 174, I-324A). In any event, plaintiff's Proposed Findings submitted below did not contend that Central America or the western U.S. were relevant markets (see Record Doc. No. 185, Proposed Finding No. 260), and for that reason alone, these contentions should be disregarded. Terkildsen v. Waters, 481 F.2d 201, 204-05 (2d Cir. 1973).

sub-market. *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 327 (1961).*

In the only conceivable relevant market in U.S. commerce—importation of bananas into the United States—United's share during the limitations period dropped considerably from its earlier levels and hovered between 46-53% at its highest and dropped as low as 42% in 1964. (III-939A). This is well below the range of 70-100% from which the courts have inferred monopoly power.**

In addition to failing to prove that United had a monopolistic market share, plaintiff also failed to prove that United actually possessed power to control prices or exclude competition. Thus, the court found that United's financial picture showed severe deterioration (see pp. 7-8, *supra*), which is not the hallmark of a monopolist.† The court also found that much of United's financial problems resulted from the intense competition faced by United which forced banana prices down. (FF 132, I-298-300A; Op. at I-216A; IV-A1706-1709, A1921, A1935-36). United's

* In United States v. Connecticut National Bank, 418 U.S. 656, 667-69 (1974) and United States v. Marine Bancorporation, 418 U.S. 602, 622 (1974), the Supreme Court explicitly rejected the view expressed in *Woods* and *Denver* on which plaintiff relies (PB 134-36) that a plaintiff need not establish "an economically differentiated region" as a relevant geographic market under Section 7, which involves the same market analysis as under Section 2. United States v. Grinnell Corp., 384 U.S. 563, 576 (1966).

** United States v. American Tobacco Co., 221 U.S. 106, 162 (1911) (86% market share); Standard Oil Co. v. United States, 221 U.S. 1, 33 (1911) (90%); United States v. Eastman Kodak Co., 226 F. 62, 79 (W.D.N.Y. 1915), *appeal dismissed,* 255 U.S. 578 (1921) (75-80%); United States v. Aluminum Co. of America, 148 F.2d 416, 423 (2d Cir. 1945) (90%); United States v. Paramount Pictures, Inc., 334 U.S. 131, 167 (1948) (70%); United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 343 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954) (75%); International Boxing Club v. United States, 358 U.S. 242, 249 (1959) (81%); United States v. Grinnell Corp., 384 U.S. 563, 567 (1966) (87%). United's market share, based on figures offered by plaintiff, also does not rise to the monopoly level. See pp. 30-31, *supra.*

† *See* United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954). *Cf.* United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 404 (1956).

inability to exclude competition is demonstrated by the court's finding that United "was faced with increasing competition particularly by banana importers from Ecuador where the government absorbed much of the expenditure that United had to make to develop its own plantations; and importers could purchase bananas in Ecuador without any significant investment or risk." (FF 132, I-298-300A).

B. United and Its Wholly-Owned Subsidiary CAG Were Not Legally Capable of Conspiring With Each Other.

Since plaintiff failed to prove that United entered into any contract, combination or conspiracy in unreasonable restraint of trade (CL 1, I-359A), it was unnecessary to reach the question of whether United and its wholly-owned subsidiary CAG could legally conspire even if a factual predicate for such a charge had been laid. (Op. n.13 at I-250A). Plaintiff argues the point (PB 139) but ignores the controlling contrary decision in the Second Circuit.

In *Beckman* v. *Walter Kidde & Co.*, 316 F. Supp. 1321 (E.D.N.Y. 1970) (discussed at p. 39, *supra*), this Court (451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972)) affirmed *per curiam* the district court which, in an alternative holding, ruled in accord with "the virtually unanimous opinion of legal commentators" that a claim of intracorporate conspiracy is not legally cognizable unless there is proof that the subsidiary and parent were in competition with each other or were held out as competitors. (316 F. Supp. at 1326). As the district court held in *Beckman*:

> "*Kiefer-Stewart* [340 U.S. 211 (1951)] . . . is distinguishable on the crucial ground that the conspiracy in that case was between two competing subsidiary companies, whereas in the instant case Beckman does not contend or offer any evidence to indicate that Fyre-Safety [the subsidiary] and Kidde [the parent] were in competition with one another." (316 F. Supp. at 1325).

Accord, *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F. 2d 1093, 1094-95 n.1 (3d Cir. 1972).*

The court's factual findings here bring this case squarely within *Beckman*'s holding. Thus the court found that CAG is a wholly-owned subsidiary of United that was engaged until August 1964 in banana production at Tiquisate. CAG sold the bananas grown in Tiquisate to another United subsidiary which in turn marketed them. CAG did not sell any bananas in the United States at all and thus was not in competition with United; nor did it hold itself out as a competitor of United. (FF 5, I-254A; IV-A1853-54). Accordingly, CAG, a mere production arm of its parent, did not and could not have conspired with its parent. See also Point III, pp. 39-40, *supra*.

C. IRCA Was Not Engaged in Commerce and thus United's Ownership of IRCA Stock Cannot Be Challenged Under Section 7 of the Clayton Act.

Since other key elements of the Sixth Claim were not proven (see pp. 57-61, *supra*), the district court ruled that it need not decide the question of whether "IRCA, the acquired company, was 'engaged in commerce' under Section 7 of the Clayton Act." (Op. n. 13 at I-250A). It is clear, however, that plaintiff failed to discharge its burden of proving this essential element of a Section 7 claim.

IRCA was "engaged in the operation of a rail system in Guatemala." (FF 1, I-253A). In this capacity it provided transportation services to United, an exporter of bananas from Guatemala to the United States. As the Supreme Court held in a decision subsequent to Judge Gurfein's ruling, "[S]imply supplying localized services to a corporation engaged in interstate commerce does not

* The cases cited by plaintiff are not in point. (PB 140). Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 703 (1962) involved an overall conspiracy between Carbide, four subsidiaries and a totally unaffiliated company, VCA. United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), *cert. denied,* 314 U.S. 618 (1941) did not involve a conspiracy between GM and its subsidiaries but rather vertical restraints akin to tie-ins imposed on GM's independent dealers. Sanib Corp. v. United Fruit Co., 135 F. Supp. 764 (S.D.N.Y. 1955) merely concerned a denial of a motion to dismiss a complaint on its face under liberal pleading rules.

satisfy the 'in commerce' requirement of § 7.'' *United States* v. *American Building Maintenance Industries,* 43 U.S.L.W. 4838, 4842 (U.S. June 24, 1975). In that case, the government had challenged the acquisition of two large janitorial service suppliers in southern California by "one of the largest suppliers of janitorial services in the country." (*Id.* at 4839). The government contended, *inter alia,* that the acquired firms were engaged in commerce since "a substantial portion of their services" had been performed "for enterprises which were themselves clearly engaged in selling products in interstate and international markets ...." (*Id.* at 4842). This contention —which bears a striking resemblance to the argument advanced by plaintiff—was squarely rejected by the Supreme Court:

> "To be engaged 'in commerce' within the meaning of § 7, a corporation must itself be directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce." (*Id.*).

In reaching this conclusion the Supreme Court cited its earlier decision in *Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U.S. 186 (1974), upon which IRCA now relies (PB 148). There plaintiff argued that purely intrastate sales of asphalt should be considered "in commerce" since the asphalt was destined for use in the construction of interstate highways. The Court was not persuaded by this argument:

> "We hold, therefore, that . . . sales to interstate highway contractors are not sales 'in commerce' as a matter of law within the jurisdictional ambit of Robinson-Patman Act § 2(a) and Clayton Act §§ 3 and 7." (419 U.S. at 199).

By a parity of reasoning, sales of transportation services in Guatemala are not "in commerce" merely because the purchaser was engaged in the foreign commerce of the United States. Accordingly, plaintiff's Sixth Claim under Section 7 of the Clayton Act must be rejected for this failure of proof as well.

D. Plaintiff Failed to Prove that the Alleged Violations Were a "Direct" and "Substantial" Restraint Upon United States Commerce.

Since the court found no antitrust violations, it did not reach the question of whether plaintiff had satisfied its burden of proving the essential element that the acts alleged in plaintiff's First and Third Claims resulted in restraints upon United States foreign commerce that were "direct and substantial, and not merely inconsequential, remote or fortuitous." *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269, 272 (2d Cir. 1964); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 285 F. Supp. 949, 953 (S.D.N.Y. 1968), *petition for cert. denied*, 407 F.2d 173 (2d Cir.), *cert. denied*, 395 U.S. 922 (1969). Plaintiff failed to prove that United's alleged violations had any adverse effect on U.S. foreign commerce. As the district court held, United simply shifted its production from the western to the eastern end of Guatemala (Bananera), which was closer to port, because Valery could be planted on lands in that area that had been abandoned due to Panama disease in the soil. (CL 5, I-360-61A; FF 135, I-300-01A; FF 224, I-342A; III-948A, 1257A; see also CL 3, 4, I-360A).

E. Plaintiff Lacks Standing to Sue.

In view of plaintiff's failure of proof on the essential elements of injury and proximate cause, the district court deemed it unnecessary to reach the issue of standing to sue. (Op. at I-238A). Nevertheless, this Circuit's well settled standing doctrine as applied to the district court's findings of fact makes it clear that plaintiff lacks standing under Section 4 of the Clayton Act, 15 U.S.C. § 15.

As this Court recently held, although "any antitrust violation may produce ripple effects of injury . . . some practical rules of standing must exclude remote parties with possible speculative injuries." *Long Island Lighting Co.* v. *Standard Oil Co.*, Dkt. Nos. 75-7177, 75-7178 (2d Cir., August 22, 1975) (Slip Op. at 5728). To that end, this Court has held repeatedly that a person whose claimed in-

jury is "remote," "indirect" or "incidental," and who is therefore outside the "target area" of the violation, lacks standing to sue.

Thus, standing has consistently been denied to persons who claimed that they were injured as a result of antitrust violations aimed at and directly affecting others with whom they had business relations, and who thus sought to recover damages which resulted incidentally from an injury inflicted upon someone else.* As summarized by Judge Mansfield in *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972):

> "In a series of decisions over the last 15 years, in all of which certiorari was denied by the Supreme Court, this court has committed itself to the principle that in order to have 'standing' to sue for treble damages under § 4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than by being 'targets' themselves." (454 F.2d at 1295).

This Court reaffirmed this principle in *Long Island Lighting Co.* v. *Standard Oil Co., supra*:

> "[T]he 'target area' standing rule is well-established. . . . Under the rule even parties whose injuries may

* *E.g.*, Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292 (2d Cir. 1958) (stockholders); Westmoreland Asbestos Co. v. Johns-Manville Corp., 113 F.2d 114 (2d Cir. 1940), *aff'g* 30 F. Supp. 389, 391 (S.D.N.Y. 1939) (employees, creditors and landlords); Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) (landlords); Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956) (suppliers and licensors); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971) (franchisors); SCM Corp. v. Radio Corp. of America, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969) (licensors).

> be both immediate and foreseeable may lack standing to pursue a private remedy if that injury is indirect or incidental, or if their business was not in the target area of the alleged illegal acts." (Slip Op. at 5728).

It inexorably follows from these controlling authorities that plaintiff has no standing to sue. Plaintiff, a supplier of railroad services, is seeking to recover lost profits resulting from injury allegedly inflicted by United on plaintiff's customers—Standard and the purported "independent" shippers—causing them to ship fewer bananas on the railroad. (Op. at I-234A). Plaintiff's damage claim is thus no different from the derivative injury unsuccessfully asserted by the patent-licensor in *Trico* and *SCM, supra,* the supplier-franchisor in *Billy Baxter* and the lessor in *Calderone, supra.* Simply put, plaintiff is claiming only "indirect" and "incidental" injury to its business and property which it sustained, if at all, not as a result of any violation directed at it, but solely by reason of its relationship with United's competitors—the real "targets" of the alleged wrongdoing. This it cannot do.

Plaintiff fares no better by predicating standing on United's alleged violation of Section 7 of the Clayton Act. The same "target area" analysis applies with equal force in § 7 cases, as this Court made plain in *GAF Corp.* v. *Circle Floor Co.*, 463 F.2d 752 (2d Cir. 1972), *cert. dismissed,* 413 U.S. 901 (1973). As Judge Hays stated with respect to the vertical acquisition challenged in *GAF,* "[t]he anticompetitive effects of such a restraint would be felt not by GAF [the acquired seller] but by the competitors of GAF and Circle Floor [the acquiring customer]." (463 F.2d at 759). Similarly, here, the alleged anticompetitive effects of United's vertical acquisition of IRCA (the acquired supplier of railroad services) were felt, if at all, not by IRCA, but by United's competitors who were purportedly foreclosed from using the railroad and thus directly injured in their ability to compete with United.

Equally specious is plaintiff's claim that it has standing because United took "steps . . . to interfere with" IRCA's business. (PB 165). By wrenching out of context a

single sentence in *Billy Baxter,* plaintiff seeks to obscure the real thrust of Judge Anderson's opinion—that to establish standing to sue, it is necessary to "link a specific form of illegal act to a plaintiff engaged in the sort of legitimate activities which the prohibition of this type of violation was clearly intended to protect." (431 F.2d at 187). There is no such linkage here. In this case, the prohibition of the alleged violation—foreclosure of competitors from entering the banana business in Guatemala—is intended to protect United's competitors in the business of importing bananas into the United States; not a railroad operating solely within Guatemala and not competitively engaged in that part of commerce where competition was allegedly restrained. Both *Billy Baxter* and *Calderone* make clear that these competitors, and not a potential supplier to them such as IRCA, are the only ones in the "target area."*

The district court's exhaustive findings completely refute plaintiff's claim to standing on the ground that the closing and sale of Tiquisate by United were "aimed at" the railroad with the intent to injure it. (PB 163). (See pp. 22-23, *supra;* Op. at I-227-28A, 220-23A; CL 11-13, I-363-66A; FF 129, I-297A; FF 134-43, I-300-04A; FF 176, I-324A).** The court specifically held that none of United's

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* The district court's findings that there was no proof that United controlled the IRCA board from as early as May 1959 (FF 124-26, I-294-96A) negate any claim of "coercion." (PB 164). In any event, as this Court emphasized in *Calderone,* "the only relevant factor [in a standing inquiry] is whether plaintiff is a 'target' of the illegal activity" (454 F.2d at 1296), and here the "target" of the alleged "conspiracy" was not plaintiff, but United's competitors. (Op. at I-234A). Moreover, plaintiff's argument (PB 164) that Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), compels a more expansive interpretation of the standing doctrine was expressly rejected by this Court in applying the "target area" concept to deny standing in SCM Corp. v. Radio Corp. of America, 407 F.2d at 171.

** In SCM Corp. v. Radio Corp. of America, *supra,* this Court denied standing to a licensor on the ground that only its licensees were directly injured despite allegations of specific intent to injure the licensor (407 F.2d at 173). In denying standing in Billy Baxter, Inc. v. Coca-Cola Co., *supra,* notwithstanding plaintiff's allegation that it was the "intended victim" of the violation (431 F.2d at 194-95), this Court stated that "the factual questions of motive and intent were not material to standing." (*Id.* at 189). *Accord, e.g.,* Long Island Lighting Co. v. Standard Oil Co., *supra,* where a similar claim (*see* Lilco Br. pp. 25-28) was unavailing.

actions regarding Tiquisate was intended to injure, or was motivated by a desire for reprisal against IRCA. (CL 13, I-363-66A; Op. at I-227-28A).

GAF Corp. v. *Circle Floor Co., supra,* provides the final answer to plaintiff's standing claim. In *GAF,* this Court denied plaintiff standing on the ground, *inter alia,* that its alleged damages did not represent "the diminution of [its] competitive position," that the alleged anticompetitive acts had not "lessened [its] ability to compete" and that, accordingly, plaintiff had not sustained "antitrust" or "anticompetitive damages." (463 F.2d at 758-59). Here, as in *GAF,* plaintiff's alleged damages do not represent a "diminution of [its] competitive position" in the relevant market for the importation of bananas. As the district court found, IRCA held a monopoly in the transportation of bananas within Guatemala. (Op. at I-218A; FF 2, I-253A). The indisputable fact is that IRCA seeks lost profits unrelated either to its ability to compete or to any diminution of its "competitive position," and thus, under *GAF,* cannot maintain this action.

VII

The district court applied proper procedural principles in the admission and exclusion of evidence.

A. The Court Applied Proper Standards in Deciding Which *Ripley* Findings Were Binding and the Findings (Which Speak No Later than 1955) Could Not Fill the Gaps in Proof.

Plaintiff contends that Judge Gurfein should have accepted as binding under principles of collateral estoppel all of the 456 findings of fact plaintiff designated from the *Ripley* litigation. (PB 167). The district court accepted 111 *Ripley* findings which it concluded upon analysis were not irrelevant or remote in this litigation, and were essential to the *Ripley* judgment. (Rulings on Collateral Estoppel at I-101A-117A).

In reaching its decision on each of the designated findings, the trial court followed the applicable legal standards.

First, the court determined whether the issue litigated in *Ripley* "was not necessary to the rendering of the prior judgment, and hence was incidental, collateral, or immaterial to that judgment." *Halpern* v. *Schwartz*, 426 F.2d 102, 105 (2d Cir. 1970). Plaintiff appears to concede that this is a proper standard. (PB 168-69).* Plaintiff mentions an additional test that the issue must meet to be precluded from relitigation in a subsequent trial—foreseeability of the importance of the issue in future litigation. (*Id.*). This factor is actually one of several policy reasons underlying the "necessity to judgment" rule. Thus, in *Halpern*, this Court defined two reasons for the necessity rule:

> "First, the decision on an issue not essential to the prior judgment may not have been afforded the careful deliberation and analysis normally applied to essential issues. . . . Second, the decision on an inessential issue in the prior judgment was not subject to the important safeguard as to its correctness, to wit: a contested review on appeal. . . . [T]he losing litigant, unless he foresaw a potential collateral effect, would have little motivation to take an appeal from an alleged error which had no effect on the judgment." (426 F.2d at 105).

In *United States* v. *Kramer*, 289 F.2d 909, 917 (2d Cir. 1961), cited by plaintiff (PB 169), this Court quoted the limitation stated "somewhat differently" by the Fifth Circuit which made foreseeability a separate requirement in addition to "necessity to the final judgment." Under either Circuit's rule, necessity to the earlier judgment is critical, and foreseeability is at best an additional rather than an alternative factor.

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* On the question of collateral estoppel, "[i]n federal-question cases, the law applied is federal law." Blonder-Tongue Laboratories, Inc. v. University Foundation, 402 U.S. 313, 324 n.12 (1971). In any event, the New York Court of Appeals applies a similar standard. Schwartz v. Public Administrator, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 960 (1969). ("There must be an identity of issue which has necessarily been decided in the prior action . . . .")

Plaintiff in its brief says nothing to undermine the district court's application of the necessity to judgment standard and addresses itself only to foreseeability, although the district court did not exclude any findings for failure to meet any foreseeability test. (PB 169). The district court made a painstaking analysis of the extensive *Ripley* record to determine which findings were essential to the judgment. (Rulings on Collateral Estoppel at I-106A). In particular, plaintiff designated certain findings that related to monopoly and effects on competition, which the district court found were not essential to the New York court's determination of the only claim in *Ripley*—breach of fiduciary duty. (*Id.* at I-105-08A; FF 8-9, I-256A).*

Plaintiff cites the affidavit of United's former counsel, Mr. Chandler, on the first summary judgment motion to dismiss the antitrust charges based on the contention that antitrust issues were involved in *Ripley* and plaintiff had thus split a cause of action. (PB 169). The short answer to this argument is that United's contentions on that motion were squarely rejected by this Court which held that "the *Ripley* complaint did not and could not properly have asserted a claim under the federal antitrust laws," because the New York courts do not have jurisdiction to determine such issues. (I-16A). The Court of Appeals thus adopted the position then taken by plaintiff's counsel which is contrary to the position plaintiff takes on this appeal.**

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* Contrary to plaintiff's contention (PB 167), the parties never agreed that antitrust-type *Ripley* findings were binding. (Tr. 764). A detailed analysis of the *Ripley* complaint, judgment and appellate decisions demonstrating the issues not essential to the judgment is contained in Defendants' Objections to Plaintiff's Designations of *Ripley* Findings. (Record Doc. No. 157, pp. 8-14).

** On the appeal from the first summary judgment decision, plaintiff's counsel successfully asserted that as to the First Claim in issue in the instant case, "The *Ripley* judgment had nothing to do with anti-trust claims and there was *no relief* in the *Ripley* judgment covering shippers of bananas *other than United*." (Affidavit of M. Victor Leventritt, counsel for IRCA, Record Doc. No. 18, p. 6). Plaintiff also asserted that the antitrust charges in the Third and Sixth Claims in the instant case were not litigated in *Ripley*. (*Id.* at 11, 14).

Finally, plaintiff does not challenge the standard applied by the trial court in rejecting some 147 *Ripley* findings as irrelevant to the present issues or so remote in time (many going back to the early 1900's) that based on the trial court's review of the evidence and assessment of the witnesses, the facts found could not possibly be proximately related to damages within the limitations period of this case. (Rulings, n.8 at I-111A; FF 19, I-260-62A).*

Moreover, since as the court correctly held (Point VII(B), *infra*), the *Ripley* findings of fact speak only as of December 31, 1955 or earlier, these findings—whether admitted or excluded—cannot fill the gaps in plaintiff's proof. The *Ripley* findings have no relevance to the Third Claim which is predicated on the closing of Tiquisate in August 1964. With regard to plaintiff's First Claim, even though the court admitted *Ripley* findings establishing control by United in the pre-1955 period, the court specifically found that such control had been dissipated and that IRCA was thus free to set its own rates and practices well before 1961. See pp. 33-35, 47, *supra*. Finally, since plaintiff did not prove injury in the limitations period (Point IV, *supra*), the pre-1956 *Ripley* findings, whether admitted or excluded, could not have had any effect on the outcome of this litigation. Rule 61, Fed. R. Civ. P.

B. The Court Correctly Determined the Effective Date of the *Ripley* Findings.

The district court held that the *Ripley* findings speak as of December 31, 1955, not 1960 as plaintiff contends. (PB 168). (Rulings on Collateral Estoppel at I-111-12A, I-117A; FF 19, I-262A). All parties in *Ripley* rested their cases at trial on November 18, 1955. The Referee adopted plaintiff's counsel's position taken in the *Ripley* case, that for res judicata purposes the findings speak as of the approximate

* The court did not reach the question of the remoteness or relevancy of the *Ripley* findings it excluded as being unnecessary to the *Ripley* judgment. (Rulings at I-111A). Many of the findings excluded under the "necessity to the judgment" test, however, were also subject to exclusion because they were plainly remote and irrelevant in this case.

date of close of the evidence.* The federal court should not give the findings a more expansive temporal effect. (FF 19, I-260-62A).

Plaintiff contends that the supplemental judgment entered on March 1, 1961, after the New York Court of Appeals' affirmance, somehow updated the findings made as of December 31, 1955. (PB 168). The sole purpose of the supplemental judgment was to calculate the amount of additional damages that had accrued, following the original judgment and pending appeals, based on the future rate increases which had been initially ordered. (PX 1518, ¶¶7 and 8 at II-854-57A; III-1026-33A). As Judge Gurfein noted, "There was no finding by Referee Hammer in the later judgment on whether any of the earlier findings were still valid as descriptive of the then current scene." (Rulings at I-112A). Moreover, since findings can only be based on record evidence, it would make no sense to assume that the *Ripley* findings could include facts which occurred after the close of trial.**

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* Tr. of Nov. 18, 1955 in *Ripley* v. *IRCA,* p. 24887, cited in Record Doc. No. 182. United offered a few additional exhibits on January 4, 1956. (Record Doc. No. 182). *Ripley* plaintiffs' counsel who represented plaintiff in this case at trial, told the Referee:

> "Mr. Lewittes: If your Honor please, we consider that in order to get a decision some day, we want this litigation to end some day, in order to get a decision some day, we would have to furnish a cut-off date, and the cut-off date we have furnished is December 31, 1955.
>
> "The Referee: Then, I understand you do not wish a decision beyond December 31, 1955?
>
> "Mr. Lewittes: Correct, your Honor.
>
> "The Referee: Very good.
>
> "Mr. Lewittes: We have asked expressly that the judgment state that nothing is decided by the case with reference to any event occurring after January 1, 1956. So that the parties are perfectly free to see what their rights are with respect to some other matter. So far as this lawsuit is concerned, we ask that the judgment be res judicata and decide matters only up through December 31, 1955." (Transcript of December 13, 1956 in *Ripley* v. *IRCA,* pp. 65-66, cited in Record Doc. No. 180).

** For example, there is a *Ripley* finding that "[t]here is at present no highway transportation from the Atlantic Coast to the interior of Guatemala . . . ." (*Ripley* Finding No. 42, Record Doc. No. 143, p. III-11). The evidence in the instant case established that beginning in 1956 the Guatemalan government constructed modern highways which caused IRCA to lose substantial business. (Op. at I-238-39A; DX 466, p. 5; III-953-54A; III-1106A, III-1333A).

C. The Court Properly Excluded the *Ripley* Evidence.

Without making any attempt to comply with the rules of evidence, plaintiff asked the district court to admit from the 25,830 pages of trial transcript and 5,900 exhibits in the *Ripley* litigation (I-106A) all the evidence in support of the proffered findings. (Pltf.'s Mem., Record Doc. No. 155, p. 7). The district court properly held that if, based on principles of collateral estoppel, the *Ripley* findings do not preclude relitigation of an issue, the issue must be litigated anew based on competent evidence. (I-113A). Plaintiff offers no authority for the novel proposition that the rules of evidence can be suspended to permit the wholesale admission of testimony and exhibits in an earlier trial involving entirely different issues. (PB 170).

Nevertheless, the district court permitted plaintiff to make a specific offer of proof. (Rulings at I-113A). Plaintiff, however, merely listed 22 *Ripley* findings, which it would like to prove, without any indication of the particular evidence it would offer at the reopened trial. (Suppl. Mem. Op. at I-120A). Nor did plaintiff establish the relevancy of the proposed facts. Thus, seventeen of the items clearly referred to the period prior to December 31, 1955 (*id.* at I-120A)—many being limited to the 1930's or before. Based on its review of the evidence and testimony at trial, the district court concluded, as a matter of fact, that such remote occurrences could not have proximately caused damage to IRCA after February 16, 1961. (*Id.* at I-120A; Rulings at I-111A n.8). The other five items were found to be cumulative of issues on which the court had already received extensive evidence at the trial. (Suppl. Mem. Op. at I-121A).* Under the circumstances, the trial court was plainly within its discretion in denying plaintiff's motion for a further evidentiary hearing after the close of the trial.

* The fact that the findings were remote and cumulative was demonstrated in detail in Defendants' "Memorandum in Opposition to Plaintiff's Request for a Further Evidentiary Hearing." (Record Doc. No. 152, pp. 3-7).

D. The Court Properly Excluded Several Exhibits.

In addition to receiving in evidence 435 plaintiff's exhibits, the trial judge read each of the few excluded exhibits and in almost all cases commented on their irrelevance or incomprehensibility. Thus, any alleged misapplication of the rules of evidence was at best harmless error. Rule 61, Fed. R. Civ. P. As explained recently by the Seventh Circuit:

> "The exclusion of evidence which should properly have been admitted is much more susceptible to having a disastrous effect upon the litigant's cause where a jury is involved as contrasted to the bench trial, where the finder of fact has heard the evidence in dispute in the form of a proffer and may well have decided that no weight whatsoever would be accorded to it even if technically admitted. *Cf.* United States v. Compania Cubana de Aviacion, S.A., 224 F.2d 811, 822 (5th Cir. 1955)." (*Aunt Mid, Inc.* v. *Fjell-Oranje Lines,* 458 F.2d 712, 719 (7th Cir.), *cert. denied,* 409 U.S. 877 (1972)).

Accord, Stevens v. *Vowell,* 343 F.2d 374, 380 (10th Cir. 1965).*

The exhibits were also properly excluded as containing hearsay. *Felice* v. *Long Island R.R.,* 426 F.2d 192, 196 (2d Cir.), *cert. denied,* 400 U.S. 820 (1970). None met the admissions exception since they were not sent to anyone outside the company (or even inside in some cases); they were not shown to have been relied on by United; and there was no proof of the authors' authority to speak for United.

* The court said that PX 4 (III-1384A) contained "a rather theoretical discussion" and that the circumstances under which it was prepared were not apparent (Tr. 2031; PB 40 fn.); PX 66 (III-1391A) was "not directed to a third party or an outsider," and was merely "a thought of one individual" (Tr. 1156; PB 39 fn.); PX 977 (III-1420A) could be merely "conjecture" of the writer and involved the sort of policy question "mixed with prophesy" which was "not binding on the corporation" (Tr. 1763; PB 86 fn.); PX 579 (III-1401A) "comes too late and it is too complicated at this stage of the game." (Tr. 2035; PB 101 fn.).

Northern Oil Co. v. *Socony Mobil Oil Co.*, 347 F.2d 81, 85 (2d Cir. 1965); *Standard Oil Co.* v. *Moore*, 251 F.2d 188, 218 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958); see also, *United States* v. *Rosenstein*, 474 F.2d 705, 713 n. 5 (2d Cir. 1973). Nor did plaintiff meet the explicit requirements of the business records exception in 28 U.S.C. § 1732(a) (1970), as defined by the courts. *Palmer* v. *Hoffman*, 318 U.S. 109, 113 (1943); *Smith* v. *Bear*, 237 F.2d 79, 89 (2d Cir. 1956); *Standard Oil Co.* v. *Moore*, *supra* at 215. The excluded exhibits were offered without foundation, two on the last day of trial without any witness on the stand. (See Tr. references in fn. p. 77, *supra*).

Accordingly, all of the documents about which plaintiff complains were properly excluded and in any event, the court's rulings could not have affected the final decision.

CONTRACT CLAIM

The district court properly found that the closing of Tiquisate in 1964 was not a breach of CAG's contract to ship via IRCA, which expired in 1963 by its express terms.

A. The Closing in 1964 Was Not a Breach.

Plaintiff urges that defendants' closing of Tiquisate in 1964 was a breach of an alleged contractual obligation to ship via IRCA until 1968. (PB 170-71). The court found that the contract in issue expired on January 1, 1963, well before the closing. (358 F. Supp. at 1376 (I-46A)).

In 1936, IRCA and CAG entered into three basic contracts governing the carriage of bananas from Tiquisate to Barrios. (I-44A). These were referred to as the "main agreement" (II-630-34A), "the trackage rights agreement" (II-635-38A) and the "operation of trains agreement" (II-639-42A). The main agreement defined CAG's obligation to ship via IRCA. (I-44A). The other two agreements related to CAG's rights to use IRCA's tracks, personnel and facilities to transport CAG's banana trains. (*Id.*). The

main agreement was for a term of 20 years while the other two contracts expired five years later. (*Id.*). In 1948, a parallel series of contracts was entered into retaining the five year differential. (I-44A). Thus, the main agreement defining CAG's obligation to ship via IRCA contained an expiration date of January 1, 1963, while the other two agreements were to last until January 1, 1968. (*Id.*).

Plaintiff argues that when the contracts are read together there was in effect a requirements contract under which United had both a right and a duty to ship via IRCA until 1968. (PB 173). But as the district court discerned, if that were the case there would have been no need for another terminal date—1963—in one of the contracts.* Indeed, the main agreement, which expired in 1963 by its terms, was the only contract obligating CAG to use IRCA's railway. (II-674A, ¶1). Recognizing the incongruity in its argument, plaintiff strains to interpret the main agreement as terminating CAG's duty to ship only in the event it built a Pacific coast port. (PB 172-73). As the district court found, however, "There is no warrant for this interpretation in the language used in the main contract which specifically limits CAG's obligation to ship via IRCA only to January 1, 1963." (I-45A). The contract plainly provides for CAG's duty to ship in language that does not tie it to the prohibition on building a port before 1963.

The district court's conclusion was also mandated by the *Ripley* findings. Thus, the *Ripley* court also interpreted the main agreement to expire in 1963. Finding 265 states:

* The agreement provided in relevant part that "until January 1, 1963, the Guatemala Company [CAG] will exercise its rights under existing contracts with the Government of Guatemala to build a port on the Pacific seaboard only at such time and in such manner as shall be agreed by the International Company [IRCA] and the Guatemala Company in their mutual interest and also that during the said period, the Guatemala Company [CAG] will use the main lines of the International Company [IRCA] to transport its bananas and to carry its imported materials and supplies under such arrangements as the parties hereto may agree upon from time to time." (I-44A, II-674A). The court found that the words "during the said period," which provided for the duration of CAG's obligation to ship via IRCA, referred to the period "until January 1, 1963" stated earlier. (I-44A).

> "Under the 1948 contracts, IRCA obtained the following advantages: . . .
>
> "(f) An extension from 1956 *to 1963* of Agricola's [CAG's] 1936 agreement not to build a Pacific port *and to use IRCA's lines exclusively* for the transportation of its bananas and imports." (I-45A) (emphasis added).*

Plaintiff points to the *Ripley* Referee's statement that the rate he fixed would apply "until the termination dates of the present contracts between IRCA and U.F. Co." (PB 173). But, as the district court found, this reference to "dates" in the plural indicates that the contracts had different expiration dates, *i.e.*, 1963 and 1968. (I-45A). Plaintiff also does not deal with the admission of its own counsel on a submission concerning the *Ripley* judgment that "IRCA believes that it is highly advantageous for IRCA to have Agricola [CAG] bound by contract to ship its bananas by rail *until 1963.*" (*Id.*; quoted in Record Doc. No. 72, p. 32).

B. United Had No Duty to Ship Any Particular Volume.

Plaintiff also contends that CAG acted in breach of contract by reducing its shipments before 1963. (PB 173-74). The district court found that CAG's only obligation was to ship "exclusively" via IRCA rather than by other means, and that obligation was fulfilled until the end of the main agreement (see Op. at I-243A). CAG had no obligation to ship any particular quantity so that variations in shipments prior to 1963 were of no legal consequence. (I-46A). This conclusion is supported not only by the absence of any clause requiring shipments in volume, but also by the express provision in the 1948 main agreement that "[CAG] will use the main lines of [IRCA] to transport

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* This and certain other *Ripley* findings referred to in this Point, whe the New York court interpreted the contracts in issue, were agreed by the parties to be binding under principles of collateral estoppel. (I-44A).

its bananas . . . 'under such arrangements as the parties hereto may agree upon from time to time.' " (*Id.*, II-674A ¶1).

Moreover, the *Ripley* court found that there was " 'no corresponding obligation on CAG to ship any given amount of bananas over IRCA at the rates specified in the contracts.' ([*Ripley*] Finding D101 [(i)])," and that " '[n]o obligation was imposed on United [UF] to ship any such bananas' ([*Ripley*] Finding B360(d))." (I-46A). These *Ripley* findings preclude relitigation of the issue in the present case. (Op. at I-242A; I-12A; FF 74, I-277A).

Plaintiff relies on the Referee's reference to "the assurance of a stable and substantial traffic volume." (PB 173). This is not a finding of any contractual obligation of CAG, but a quotation from United's argument as to the practical benefits of the arrangements. (Record Doc. No. 74, Ref. Rep. and Dec., pp. 193-94). Plaintiff also quotes the Appellate Division's reference to "the vista of future operations between the companies." (PB 174). But this statement refers to the future rate determination by the court of equity (8 App. Div. 2d at 326). Rather than implying obligations, the New York courts in *Ripley* at IRCA's behest continued all the contracts in force without any changes except the rates. (8 N.Y.2d at 436-37; FF 74, I-277A; FF 126(e), I-296A; Op. at I-197A).*

The district court rejected plaintiff's argument (PB 171-72) that because of IRCA's allegedly "heavy obligation" under the contract, CAG's obligations should be enlarged by implying additional duties.** It is settled law that courts may not consider the adequacy of consideration and imply obligations to correct an alleged imbalance. *Mencher*

* Plaintiff fails to point out (PB 174 n.) that Judge Breitel said there was "no agreement" providing any guaranteed business. (Tr., App. Div., pp. 174-75, quoted in Record Doc. No. 66, Deft.'s Reply Mem., pp. 32-33).

** In addition, plaintiff failed to prove that the parties intended such an additional obligation, which, as the district court noted, is an essential prerequisite to judicial implication under the cases cited by plaintiff. (PB 171; I-47A, n.8).

v. *Weiss,* 306 N.Y. 1, 8, 114 N.E.2d 177, 181 (1953); *Warner-Lambert Pharmaceutical Co.* v. *John J. Reynolds Inc.,* 178 F. Supp. 655, 666 (S.D.N.Y. 1959), *aff'd,* 280 F.2d 197 (2d Cir. 1960); *Restatement of Contracts,* § 81. Here, there was consideration flowing from CAG to IRCA, *i.e.,* CAG's express obligation to ship "exclusively" via IRCA rather than by other means, and to do so until 1963. (I-47A; *Ripley* v. *Int'l Rys. of Central America and United Fruit Co.,* 8 N.Y.2d 430, 438 (1960)).

Plaintiff argues from references in the preambles to the contracts that the parties anticipated a large amount of banana traffic. (PB 171). The fact is that there were substantial shipments by CAG throughout the period of the contract. (FF 202, I-335A). Moreover, as Judge Cardozo aptly said in declining to imply an obligation under similar circumstances:

> "Fulfillment may fall short of expectation. At least there has been gained a foothold from which occasion can be seized." (*Walton Water Co.* v. *Village of Walton,* 238 N.Y. 46, 50, 143 N.E. 786, 788, *reargument denied,* 238 N.Y. 555, 144 N.E. 889 (1924)).

Even assuming that IRCA's fulfillment fell short of its expectations, that would nevertheless be insufficient to give rise to any implied obligations.

Finally, in the cases on which plaintiff relies (PB 173), the defendants abandoned their business during the existence of the contract, whereas CAG did not abandon Tiquisate until a year and a half after the contract expired on January 1, 1963. (I-48A; Op. at I-243A). The district court found as a matter of fact that variations in shipments prior thereto were largely attributable to Panama disease and blowdowns, and that apart from these natural hazards, CAG kept up the Tiquisate plantations during the period of the contract. (Op. at I-243-45A; FF 176, I-324A; FF 187, I-328A; FF 200-04, I-334-36A). Accordingly, there was no breach of the obligation to ship exclusively via IRCA until January 1, 1963.

Conclusion

For all the foregoing reasons, it is respectfully submitted that the judgment appealed from should be affirmed.

Dated: New York, N.Y.
September 29, 1975

Respectfully submitted,

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